

Supreme Court, U. S.

FILED

SEP 6 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-350

NO. _____

WILSON O'BRIEN, pro se
Petitioner

- v -

DUTCHIE, INC.
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN, pro se
Box 39023
Cincinnati, Ohio 45239

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1. <u>Question 1</u> - re Discovery Efforts:	41-44
Magistrate's Pretrial Order March	

1972 (Appendix M) says: No Answer has been filed by defendant; counsel fails to appear. Petitioner's counsel advised that discovery must proceed. Both parties to furnish Magistrate with report in writing by April 21, 1972 (/s/ Burton J. Perlman). No reports ever filed.

District Court orders petitioner's amended complaint (doc 8) filed December 15, 1972, and

on petitioner's motion reinstates defendant's local counsel relating to discovery items of November 28, 1972. Order of District Court, May 7, 1973 (Appendix J) stating: As to motion to compel discovery, Court agrees with Magistrate (Reference) Report that it would be futile to act on that because other requests for discovery stand unanswered. (Magistrate's unannounced-unattended Reference NO. ____).

On motion of Court, Order, May 7, 1973, permits defendant's local counsel's second withdrawal - with Court's letter, March 13, 1973 to local counsel, Bernard L Rosenberg, saying: "We note you have forwarding counsel (A. David Gomborov) who has not been cooperative, to say the least. Advise you to tell him that if this condition continues we feel a Duty to notify his Bar Association."

(app herein makes reference to appendix page no. of record on appeal 76-1750)

2. Question 2 - re Joinder-Amendment motions:

44-52

Magistrate's Reference Report, May 7, 1973 (Appendix K) being silent as to petitioner's amendment-motion (doc 19), March 6, 1973, to join officers and directors of Dutchie, Inc., (Group A) as codefendants.

2a. Paragraph 4(p) of amended complaint (doc 8) relating to par: 20 of Dutchie contract, says: Defendant has not been licensed to do business in Ohio * * * and has failed to appoint statutory agent.

44-48

2b. Magistrate's Report, January 7, 1974 (Appendix H) avers: On December 7, 1973 petitioner filed motion to join (Group B) - defendant and claims, his former counsel, (doc 26). Whatever relief petitioner might be entitled to against them can only be asserted in a separate proceeding.

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2c. Petitioner's show-cause supplement-49-51
tal amendment, May 16, 1975 (doc 38), including affidavits, exhibits, attachments, Bill of Exception, Case 74-0982, Lucas County Common Pleas Court, stating: "April 1, 1975 petitioner had to file appeal in Supreme Court of Ohio from Case 7821 (74-0982) of Sixth District Court of Appeals, Lucas County, Ohio which sustained a void, non-jurisdictional, fraudulently obtained, default judgment, filed November 13, 1974 against petitioner. Judgment to Mike Aman and Toledo counsel, Wilbur Jacobs re alleged false arrest and alleged malicious prosecution relating to par 6m of amended complaint (doc 8).

As of this date, May 12, 1975, neither Mike Aman nor counsel Jacobs have made a responsive pleading to Memorandum of Jurisdiction filed April 1, 1975 in Ohio Supreme Court (app p79; app p135: ie - record to US CofA).

2d. re (DOC 8) amended - complaint: 51-52
par 3:--petitioner has only received inequitable conduct extending from most of defendant's employees * * * This bad faith and gross negligence extending beyond corporate form to include acts by others in matters adverse to interests of petitioner. (app p151).

3. Question 3 - re orders of dismissal as to (conditional) default judgments: 52-54

District Court repeating dismissal of petitioner's action, to wit:

3a. Order, January 7, 1974 (Appendix G), affirms: "Based on findings and conclusions of Magistrate, it is ordered that this case be dismissed with prejudice unless petitioner, within 30 days, applies for default judgment." (apparently as per magistrate's unannounced reference (doc 20) Appendix K, May 7, 1973).

3b. Order, December 29, 1975 (Appendix D), says: "Court must conclude that petitioner has not shown cause why this case should not be dismissed for lack of prosecution for failure to apply for default judgment, or in alternative, asks for and obtains leave to file amended complaint which seeks to add parties-defendant and stating facts upon which relief can be granted; dismissal - without prejudice."

(1) with petitioner's motion (doc 46) February 6, 1976 to vacate order (doc 43; App D), where petitioner again without benefit of Rules of Discovery or sanctions thereof - shows George E Snyder, Dutchie Inc. or otherwise, existing, in operation, without second mortgage, utilizing counsel in other suits, leasing Dutchie-Smithsburg, Md. - plant to Hadley Farms Dairy; with nation-wide H.J. Heinz

(ore-Ida) marketing-distributorship-deal, - notwithstanding: District Court's show-cause Hearing contentions, May 27, 1975, to contrary with Dutchie forfeiting Delaware Corporation franchise, March 1, 1974, for non-payment of franchise taxes.

3. Order, March 22, 1976 (Appendix C) saying: "Court's Order of December 29, 1975 (doc 43) speaks for itself. We see nothing which seeks to name anyone but defendant (Dutchie, Inc.). Within action is dismissed, without prejudice, - - at petitioner's costs.

4. Question 4 - R59 and R60(b) characteristics: 54-57

With regard to irregularities, rulings, orders, abuse of discretion, preventing petitioner from having fair and impartial hearings. Misconduct of prevailing party, errors of law and judgments contrary to law repeatedly called to court's attention, as

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District Court's letter, December 15, 1972: " * * * Law (28 USC sec 1654) expressly permits party to plead and conduct his own case * * * we recommend that you obtain counsel and <u>that defendant obtain counsel</u> * * * the extended recitation of facts in amended complaint (doc 8) gives cause for concern * * * ."	
a. thereafter culminating in defendant totally ignoring orders and directions of District Court and Court of Ap-	

peals, as well as Civil Rules and substantive law; projecting through District Court a picture of non-existence, no counsel, and non-appearance, with dismissal of petitioner's action at petitioner's costs - - compounding a continuing wrong as shown by items and documents herein, as briefed in two appeals to Sixth Circuit Court of Appeals.

6. Question 6 - re Orders on appeal:58-61

If, for petitioner, to follow purported 'guidance of the court' becomes self-surrender of one's legal rights and benefits leading to judicially-enacted contract cancellation and tort-waivering of rights supported by Fed R Civ P, Uniform Commercial Code, common and statute law - - then Involuntary Dismissal of any action, without proceeding to a decision on its merits - WHERE there has not only been evasion of conformance with, and to, court procedures, BUT

passive and active subversion of aims, proceedings, and functions of court, so harmless error becomes total error, and partial denial of legal and equity rights become total-dismissal tantamount to a legal rip-off. (appeal brief 74-1174, February-1974, p18).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

WILSON O'BRIEN, pro se
Petitioner

- v -

DUTCHIE, INC.
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Your Petitioner, Wilson O'Brien, respectfully
petitions this Honorable Court for a Writ of Cer-
tiorari to review Orders and Opinions of United
States Court of Appeals for the Sixth Circuit en-
tered in this cause.

OPINIONS BELOW

An Order (Appendix C) was entered by District Court, March 22, 1976, not reported, affirming and enlarging District Court Order (Appendix D) entered December 29, 1975. Said orders not in accord with Decision of Sixth Circuit Court of Appeals (Appendix F) entered October 14, 1974 in regards to petitioner's prior appeal from similar District Court Order (Appendix G) entered January 7, 1974 based on Magistrate Report (Appendix H). Order of Sixth Circuit Court of Appeals (Appendix A) entered March 25, 1977, without opinion.

JURISDICTIONAL STATEMENT

Grounds for jurisdiction of this Court are that Court of Appeals has so far departed from accepted and usual course of judicial proceedings and/or has so far sanctioned such departure by

District Court as to call for an exercise of Supreme Court's power of supervision.

The date of Order of Court of Appeals sought to be reviewed and date of its entry is March 25, 1977 (Appendix A).

An Order of Sixth Circuit Court of Appeals denying a timely Petition for Rehearing was entered May 10, 1977 (Appendix B).

An Order, July 26, 1977, granting an extension of time within which to petition for certiorari, received by petitioner August 4, 1977, extended time from August 8 to include September 13, 1977.

This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

A. Involving abuse of discretion and process, re:

1. Question 1 - Discovery Efforts:

Denying petitioner's motions to compel discovery and court's failure to impose sanctions on petitioner's failure to make discovery. While no-response, no-counsel, non-appearing, George E. Snyder, President, Dutchie, Inc., continually ignores orders of Federal Courts - - notwithstanding show-cause order May 2, 1975 (Appendix E).

2. Question 2 - re joinder-amendment motions:

Denying petitioner's motions to file supplemental amendment and/or joinder parties-defendant in petitioner's efforts to set boundaries of suit as to:

2a. Joinder of officers and directors of Dutchie, Inc. (Group A), March 6, 1973 (doc 19).

2b. Joinder of petitioner's former counsel Tom Zins, Richard Pennington, firm of Brumleve, De-Camp & Wood (Group B), December 7, 1973 (doc 26).

2c. Denial of 2a and 2b being such as to forestall petitioner's joinder motion of potential Toledo party-defendants (Group C), of petitioner's show-cause motion (doc 38), May 16, 1975, related to George Snyder's Dutchie-Toledo operation and successive occurrences and torts therein which relate back to amended-complaint (doc 8) ordered filed by District Court, December 15, 1972.

2d. And, to forestall joinder-discovery of others (Group D) specifically-named in amended-complaint as potential party-defendants - even for limited purposes of further discovery.

3. Question 3 - Re Orders of dismissal as to - -

(conditional) default judgments:

Order (Appendix D), December 29, 1975, re-

peating dismissal of petitioner's action, in this instance without prejudice, as (alleged) lack of cause shown why dismissal should not be for (alleged) lack of prosecution, failure to take conditional default judgment - - as described by the Sixth Circuit Court of Appeals.

a. or in alternative: petitioner ask for and obtain leave to file amended complaint seeking to add parties-defendant and stating facts on which relief can be granted; Notwithstanding:

(1) petitioner's supplemental - amendment, (doc 38), May 16, 1975, with affidavits and exhibits therewith re show-cause order (doc 37);

(2) petitioner's combination joinder-motion repeating attempts to join (Group A) officers and directors, Dutchie, Inc., and (Group B), former counsel of petitioner in (doc 40), May 30, 1975;

(3) petitioner's motion (doc 46) to vacate Order (doc 43) of December 29, 1975 and to add (doc 46) as addendum up-date to (doc 38).

b. Order (Appendix C) March 22, 1976 (doc 48) saying: " * * * we see nothing in this submission * * * within action is hereby dismissed, without prejudice, - - - at petitioner's costs.

4. Question 4 - continuing abuse of discretion and process with regard to: irregularities, errors of law and erroneous rulings, judgments contrary to law in denial of right to fair and impartial hearings - - repeatedly called to attention of the court.

5. Question 5 - re lack of local counsel and non-cooperating forwarding counsel of Corporate Defendant, and its Alter-Ego - George E. Snyder, re action replete with misrepresentation, deceit, and fraud.

6. Question 6 - Orders on Appeal (Appendix F, A and B respectively): "We conclude that such a conditional order (of dismissal, with prejudice) * * * is not a 'final decision' * * * The Question of whether in issuance of said order the District

Court abused its discretion will be presented in event a final decision is entered by District Court and an appeal perfected therefrom and comment on that issue therefore seems appropriate. * * * A clue to alternative relief may be found in prayer of December 15, 1972 (doc 8) wherein plaintiff includes prayer for specific performance." (CofA 74-1174, October 14, 1974, Appx F).

After numerous efforts to assist O'Brien in presenting his action, District Court dismissed the suit without prejudice * * *. The Court concludes that decision of District Court must be affirmed * * * O'Brien has demonstrated his inability to present his case without assistance of counsel. * * * (Appendix A, 76-1750).

Upon consideration of plaintiff-appellant Petition for Rehearing: and it not appearing that Petition raises any matter not previously considered by the Court, it is ordered that Petition be denied. (Appendix B, May 10, 1977; Petition for

Rehearing fully referenced to Record (on appeal, 76-1750, to app and ex, as brief on appeal is referenced by example herein).

CIVIL RULES OF PROCEDURE
CONSTITUTIONAL - STATUTORY
PROVISIONS INVOLVED

The pertinent provisions of Civil Rules of Procedure, Constitutional - Statutory provisions indicated hereinafter are set forth in Appendix B, Appendix C, or otherwise, as shown herein: VIII-

APPENDIX-B: Civil Rules of Procedure:

No. 8(a)	No. 37(d), (b), (2) (A)(B)
No. 10(A)	No. 43(e)
No. 12(C)	No. 46
No. 15(A), (b), (c), (d).	No. 52
No. 18(a)	No. 53(b),(d),(e),(c).
No. 19(a)	Evidence Rule No. 103
No. 20	No. 54(c)
No. 21	No. 55(d)

OTHER - Local Rules and Orders:

Local Rule 17(f)

Local Rule 17(b)(1)

Local Magistrate Order No. 2

Local Magistrate Order No. 3

APPENDIX - C: Constitutional - Statutory

Under Color of Office: Every person, who, under color of any statute * * * subjects or causes to be subjected, any citizen of U S * * * to deprivation of any rights, privileges, * * * shall be liable to the party in an action at law. * * * Under color of office * * * under civil rights includes judicial action.

STATEMENT OF CASE - FACTS

A. Basis for Federal Jurisdiction, in court of first instance, originated with diversity of citizenship re contract-transaction initiated by George Snyder, former senate majority-leader in State of Maryland, President, Dutchie, Inc., a Delaware-chartered corporation based in Hagerstown, Maryland, in contracting with petitioner, Wilson O'Brien, resident of Cincinnati, Ohio, in hot, soft-pretzel operation involving equipment, food product, and merchandising program promoted in every respect by George Snyder.

1. Original complaint (app p3-4)* A260138 filed September 8, 1971, Hamilton County Common Pleas Court, by petitioner's counsel, Tom Zins, for contract losses in excess of \$ 40,000.00, after Dutchie, Inc. total breach of 1970 Dutchie-DEI negotiated contract by prior counsel Zins and George Snyder, following therewith and there (* app - herein makes reference to appendix page no. of record on appeal 76-1750)

-after of misrepresentations, deceit, and fraud.

a. Action subsequently removed from Hamilton County Common Pleas Court to U S District Court, Southern District of Ohio, Western Division on October 6, 1971, with or without Answer, as alleged by local counsels for petitioner and defendant, Between October 6, 1971 and March 1, 1973, as shown by:

(1) October 19-20, 1971 correspondence to and from defendant's local counsel, Bernard L. Rosenberg, and deputy clerk of court of District Court, Scott Brown, relative to October 6 removal effort: "Papers received and attached to complaint as they should have been when complaint was filed * * * ." (app p3b).

(2) Magistrate's Pretrial Order No. 1, March 13, 1972, that: "No Answer has been filed by defendant. " (app p3a; Appendix M).

(3) August 1972, counsel Zins invoices petitioner for: "filing complaint and review Answer

and removal documents * * *; misc services including checking of dockets at Common Pleas Court and Federal Court to assure proper service * * * and proper filing of all pleadings." (app p107).

(4) July-August 1972 statements by deputy clerk, Scott Brown, to petitioner, that: "No Answer has been filed in case" and checking file to repeat this assertion (app p108).

(5) on petitioner's first attempt to file amended complaint, September-1972, deputy clerk Brown sent file and petitioner to Magistrate's office where Magistrate discovered the Answer in rear portion of case file. Following this, deputy clerk Brown made entry on docket sheet, in-line with October 6, 1971 entry (doc 1) - - 'w/Answer'

(6) defendant's local counsel, Rosenberg, made docket entry, A260138, March 21, 1973: "This will confirm that on October 6, 1971 this matter was removed to U S District Court * * * that jurisdiction has been accepted by said court

* * * so that all proceedings in Common Pleas Court may now be suspended." (app p3c,3d).

B. FACTS MATERIAL TO QUESTIONS PRESENTED:

1. Question 1 - re Discovery Efforts:

District Court orders defendant to respond within 20 days to petitioner's amended-complaint (doc 8) (app p4-12b) ordered filed December 15, 1972 (app p14); thereafter permitting twin withdrawals of counsel for petitioner and Cincinnati counsel for defendant in December-1972.

On petitioner's motion District Court orders defendant's counsel reinstated relative to petitioner's discovery items of November 28, 1972.

Magistrate's (Reference) Report (Appendix K) says: "Before us are motion to compel discovery (app p15-20). Examination of supporting papers show that petitioner's efforts at discovery (with affidavit per local rule 17(b)(1) therewith) have been met by silence on part of defendant. Apparently defendant is not participating further in

the litigation." Magistrate (Appendix H) states:

"On May 7, 1973 this court filed order declining to act on petitioner's motion to compel discovery because other requests for discovery by petitioner remain unanswered by defendant and indicating to petitioner that application for default judgment was appropriate. * * * It seems that petitioner would rather have discovery than judgment."

Sixth District Court of Appeals in Order (Appendix F; app p71-73) says: "At the very least, refusal of a party to comply with discovery is scarcely ground for denying subsequent motions for discovery. District Court failing to take into account contempt determinations."

Notwithstanding Magistrate's Pretrial Order No. 1 (doc 6), March 13, 1972, 'that discovery must proceed' (Appendix M); after remand, between October 14, 1974 and December 29, 1975
- - - - -the only action taken by Dis-

trict Court being show-cause Order (Appendix E) (app p74-75), May 2, 1975, with Hearing thereon, May 27, 1975, (transcript - app p113-p122).

"For petitioner to show-cause why action should not be dismissed, in that petitioner is entitled to default judgment but has not applied for same. Defendant is Ordered to respond within 20 days of May 2, 1975 to petitioner's requests for interrogatories - to produce - and admissions (and genuineness) of November 28, 1972 and January 23, 1973 or show cause why defendant should not be held in contempt for such failure on May 27, 1975. Petitioner's application for entry of order to impose sanctions on failure to make discovery, filed February 13, 1973 (doc 18)(app p40-41) is granted"

Defendant did not respond in 1972-73, nor in 1975. Defendant did not appear May 27, 1975. Court did not enter any contempt determinations, nor enter any Rule 37 sanctions/orders.

2. Question 2 - re joinder-amendment motions:

2a. District Court, May 7, 1973 (Appendix J) (app p46-47) says: "In connection with motions for discovery and for leave to file amended complaint [insert: joinder officers & directors, Dutchie, Inc. relating to doc 8-amended complaint], this matter was referred to Magistrate under Order of Reference No. ____ [insert: magistrate's report is silent (Appendix K; app p44-45) as to joinder].

In connection with motion for leave to file amended complaint [insert: doc 19, app p42-43] we have examined (it) and find no significant difference between original complaint [insert: doc 8] and amended complaint [insert: doc 19] except the latter adds detail which is not necessary. No showing amendment [insert: joinder] is necessary in interests of substantial justice." (App p141).

[insert-ed: by petitioner for clarification].
NOTWITHSTANDING: amended complaint (doc 8) in toto and par 4(p) thereof specifically, as to: 'Dutchie

Inc. doing business in Ohio without qualifying with Ohio statutes.'

2b. Petitioner's motion, December 7, 1973, for joinder of prior counsel (Group B; doc 26; app p57-62a) as codefendants, denoting same as par 8B of amended complaint (doc 8): ' * * * to join jointly and severally the law firm of Brumleve, DeCamp, and Wood as represented by prior counsel for petitioner, Richard Pennington and Thomas Zins by reference:

(1)'re differences indicated by and between original complaint as filed by attorney Zins and subsequently removed to U S District Court by attorneys Rosenberg, Zins, and Pennington, as alleged by them(p11-13 herein) and the amended complaint (doc 8); and discovery proceedings served on attorney Rosenberg November 28, 1972 and January 23, 1973, as subsequently filed with motion to compel discovery. (app p58)

(a) 'said differences, both as to al-

legations and prayer for relief, being due to malpractice, misfeasance, non-feasance, and simulation in misrepresentation of details of action as to construction, interpretation, availability, and enforcement of remedies and pleadings as regards breaches of contract, warranties, insurance, fraud overvaluing and misstating services rendered re: their development and prosecution, or lack thereof of File 8155 in U S District Court.

'On the Record as shown by correspondence herein-outlined between petitioner and prior counsel; also as action(s) and lack of action(s) of prior counsels for petitioner and defendant, dovetail into orchestrated concert.(app p59-62; app p138, doc 46).

(b) 'where petitioner's freezer equipment from closing-out Zayre store in Columbus, Ohio moved illegally from this location reportedly by Mike Aman and another representing themselves to Rink's store manager(new tenant) as having the

proper authority to so remove, relating back to par 6m of amended complaint (doc 8) (app p12, p 78). Arrest of Mike Aman effected by Writ of Mandamus 73-923, Ohio Supreme Court, November 19, 1973 - with petitioner's prior counsel failing to take any steps, in any manner, to correct or secure remedy for same or to make sure that a crime report had been made thereon.' (app p62, p 79, p84, p135, p143-144).

(2) Page 10 - appeal brief 74-1174, sec VI. F. f: 'page 6 of said motion (doc 26), re: concert of action or lack thereof of both counsels herein which carried over into Hamilton County Municipal Court, Case No. 113790 - as indicated in attachments to (doc 26) motion to set aside and to impose sanctions: (a) and (b) being petitioner's reports to Cincinnati Bar Association, October 19, 1973, re: attorneys Bernard L. Rosenberg (plaintiff's counsel therein) and Tom Zins (unauthorized counsel for defendant-petitioner therein), covering: two default judgments

obtained in same case (fraudulently) with their subsequent set-asides, attempted (fraudulent) execution - - with final entry, to wit: 'entry of dismissal at plaintiff's (Rosenberg) costs.'

2c. As of November 10, 1975 (and 1977) Mike Aman and counsel Jacobs (Toledo) have made no effort to execute re void, non-jurisdictional, false testimony, default judgment given by Judge, John J Connors, Jr. in Lucas County Common Pleas Court, November 13, 1974 on alleged actions of false arrest and malicious prosecution by petitioner. (app p83; doc 38). November 10, 1975 petitioner filed motions to vacate said default entry - filing simultaneous Affidavits of Disqualification in Lucas County Common Pleas Court re Judge Connors to hear the motion to vacate and in Sixth District Court of Appeals (Lucas County) to bar judges therein to hear Affidavit of Disqualification re Judge Connors (app p145) or to hear any appeal that might develop on hearing, if any, on motion to vacate judgment.

(1) January 2, 1976, Ohio Sixth District Court of Appeals misrepresented Affidavit of Disqualification therein as being a non-timely filed application for reconsideration. (app p145).

(2) January 7, 1976, Judge Connors, by letter to petitioner, denies motion of November 10, 1975 for hearing to vacate said void, fraudulent, default judgment - notwithstanding: Affidavit of Disqualification on record. (app p145).

2d. December 28, 1973 petitioner filed affidavit for replevin and/or damages of petitioner's equipment taken by bankruptcy-conversion of Arlan Discount Stores, National Account Set-up of Dutchie, Inc. - with all equipment removals therefrom being contract-controlled by Dutchie, Inc. (app 63)

Magistrate's Report (Appendix H; app 66-68a) January 7, 1974, stating: 'This is beyond the power of this court to grant since Arlan's is not a party to the litigation, the claim is appropriate only to a separate suit, not properly brought in

this court in absence of requisite jurisdictional amount.'

(1) Petitioner has only received inequitable conduct extending from most of defendant's employees (doc 8 - par. 3, app p6-7):

par 4: Les Kefauver, equipment designer, leaving Dutchie, Inc., March 31, 1971 to become General Manager of T. L., Inc. of Toledo - parts supplier and distributor for Dutchie, Inc.;

par 5: through George Snyder who appointed V.P., Vince Petti (Dutchie and Pet, Inc.) to handle the Zins-contract problems.

par 4a-4b: Defendant had Don Frazee of Columbus Indiana bring in equipment and make purported service calls in petitioner's exclusive territory.

par 8: (app p12): Reserved (for future joinder-amendments relating thereto).

(2) District Court in show-cause hearing, for which defendant failed to appear, had petitioner proffer amendment (doc 38; app p76-108).

Previously therein Court passed onto petitioner George Snyder's purported message alleging non-existence, second mortgage, verge of bankruptcy, not able to afford counsel, asking court - - what he should do ? (app p115-116).

District Court therein expresses fixed anticipatory decision that judgment can only be had against Dutchie, Inc., that too much time had passed to permit amendment or joinder at this late date (app p121); notwithstanding: petitioner's prior attempts for amendment-joinder-discovery-relating back to amended complaint (doc 8), civil and criminal proceedings in Franklin and Lucas Counties, involving operations of Dutchie, Inc., and Toledo business associates of George Snyder, President, Dutchie, Inc. as revealed from amended complaint, December 15, 1972, through (doc 46) of February 6, 1976 - wherein petitioner contraverts contentions of Orders and hearing-transcript that do not reveal any justifying reasons for denying

the efforts for amendment - joinder - discovery.

3. Question 3 - re orders of dismissal as to (conditional) default judgments:

Involuntary dismissal of petitioner's action under FRCP 41(b)(1) is governed by defendant's move for dismissal of any action or claim against him for failure of petitioner to prosecute or to comply with civil rules or any orders of court. Defendant has not made such a motion.

COURT: You're not satisfied then to file application for default judgment against Dutchie, Inc.?

O'Brien: If your statement says they are not in operation, would there be a point in filing default judgment against Dutchie, Inc., if you said they take bankruptcy- (Tp-p4; app p117).

a. petitioner's letter to prior counsel on May 10, 1972: ' * * * if Dutchie fails to comply with Pretrial Order No. 1 why don't we press for default judgment ? First, and in any case, amend our petition to * * * include deceit, fraud,

punitive damages, attorneys fees * * * specific performance.' (app p80, p104).

(1) Tp - p2-3, May 27, 1975 (doc 41):

Court: Well, my secretary received a call and recorded it, and I've listened to the recording. It's from a person by name of George Snyder * * * I want to advise you of contents of that recording * * * he advised me that Dutchie was no longer an operating company, that it had forfeited its franchise * * * He said the company had no means to employ an attorney and he asked for instructions of what to do. (app p115-116; p152) .

(a) MARYLAND NEWSPAPER ARTICLES:

October 9, 1974: ' * * * its not for sale though, Dutchie will still exist and will pay its debts', he declared, * * * Snyder said he is currently negotiating with Hadley Farms Dairy to lease the Smithsburg, Md. plant. (app p155).; November 12, 'He has leased his pretzel operations to Hadley Farms Dairy of Gaithersburg, Md.' (app p156).

August 8, 1975, Daily Mail: (ex 16h p72; app p156)

' * * * Snyder got together six of the stockholders and bought the mortgage * * * Four more stockholders are also in on the deal. * * * Snyder said the plant (Smithsburg) will continue to churn out pretzels under three-way agreement that has Snyder and stockholders owning the plant, Gaithersburg dairy outfit running it, and an Idaho food firm (Ore-Ida) selling the product.'

b. District Court Order, December 29, 1975, (Appendix D; app p123-124a) where default-portion appears to be similar (conditional) order as District Court Order, January 7, 1974 (Appendix G) remanded by Sixth Circuit Court of Appeals, October 14, 1974 - - - with abuse of discretion and process continuing therefrom.

(1) with no grounds of dismissal existing re: lack of prosecution for failure to take a conditional default judgment. (app p159).

(a) and where District Court does not formally and properly issue or enter contempt sanctions, or other sanctions orders, from either May 2, 1975 show-cause order-hearing or petitioner's motion to impose sanctions, February 13, 1973, - it is abuse of discretion for court to award conditional default judgment on failure of petitioner to apply for same. (app p85).

WITH RESPECT TO: portion of order (doc 43) as to: " or in alternative - petitioner asks for and obtains leave to file amended complaint * * * " - - - petitioner avers that amendments and supplemental amendments as proffered (app p 160):

- a. amended complaint (doc 8) (app p4-12b) -
- b. joinder of officers and directors (doc 19) (app p42-43) -
- c. joinder of prior counsel (doc 26) (app p57-62a) -
- d. supplemental amendment (doc 38) (app

p76-88; initial filing included a-b-c hereinabove)-

- e. combination joinder (doc 40) re (doc 19 and 26) (app p109-112) -
- f. motion (doc 46) to vacate Order (doc 43) and up-date addendum to (doc 38) (app p127-164).

where petitioner repeatedly filed, repeatedly sought to add parties-defendant, failing to obtain leave of court, except for (doc 8) December 15, 1972, but stating: with more specificity of facts - evidentiary and otherwise - than required by Federal Rules of Civil Procedure, notwithstanding: Order (Appendix C) March 22, 1976: "This Court's order of December 29, 1975 (doc 43) speaks for itself * * * we see nothing in his submission which seeks to name anyone but defendant. (insert: Dutchie, Inc.).

4. Question 4 - re R59 and R 60(B) characteristics:

a. Affidavit per local Rule 17(b)(1) of motion to compel discovery, January 23, 1973, (doc 16) including therein: George Snyder's January 2, 1973 phone call to petitioner, that he would: "proceed to secure replacement counsel for Cincinnati" and petitioner telling him that petitioner would be open to meeting with him in presence of the court." (app p18-20).

b. Affidavit re File 8155 - as to dates, certifications, entries, and correspondence pertaining to removal, letters of the court, and related matters as referenced by this Petition.

c. Petitioner's request, with no response thereto, as regards Magistrate's (unannounced, unattended) Reference No. ____ (doc 24, app p48-50): as to: (1) Were any hearings conducted in connection with this reference? Where? When?
(2) In failure to comply with court orders

are defendant and his counsel sufficiently guilty of contempt (of court) ?

(3) If unable to obtain response from defendant, and denying sanctions of Rule 37, how is it proposed to obtain accounting from defendant ?

(4) If there are no valid objections by defendant to discovery or discovery sanctions, and defendant prefers to stand 'mute' - why should petitioner be denied use of sanctions and discovery, - if Magistrate says: "This is an action of a significance somewhat greater than usual ?"

(5) Petitioner requests magistrate for records of: evidence offered, evidence considered, evidence not considered, evidence excluded and reasons therefore ?

(6) How does magistrate's report (Appendix K) comply with Fed Rule Civ P 54(c)?
(DOC 24) filed May 18, 1973 * * * was not sent to magistrate until petitioner, checking on it, found it still in file on June 29, 1973. On petitioner's

request deputy clerk sent it, hand carried, to magistrate's office (appeal brief 74-1174, p6).

(a) NOT IN BRIEF: July 25, 1973 District Court, by local order No. 3 re US Magistrate, revised Order No. 2 of September 2, 1971 by deleting provisions therefrom which conformed it to Fed Rule Civ P 53 relating to masters and references. Order No. 3 thereafter seemingly in conflict with provisions of Rule 53. (copies of Rules No. 2 and No. 3 included in Appendix Exhibits U and V, pgs. 67a - 70a)..

d. Motion to set aside magistrate's reference (doc 20) and order (doc 21) based thereon and to impose sanctions (doc 18) includes therein: (1) Rule 53(c) - 'master shall make a record of evidence offered and excluded in same manner and subject to same limitations as per Rule 43(c) for a court sitting without a jury.' (app p51).
[since replaced by Evidence Rule 103: Nothing precludes taking notice of plain errors * * *].

(a) Report of Magistrate includes recommendations contrary to Rule 55 - Default by ignoring 55(d), to wit: 'in all cases a judgment by default is subject to limitations of Rule 54(c)' (app p52); R54(c), to wit: ' judgment by default shall not be difference in kind or exceed in amount that prayed for.'

(2) Rule 53(b) affirms that reference to a master shall be the exception and not the rule. In action tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon showing that some exceptional condition requires it.

(a) purported reference for consideration of motion to compel discovery, to impose sanctions and joinder of officers & directors (ignored by magistrate) - do not appear to be a showing that some exceptional condition requires it.

e. Affidavit re Bill of Exceptions, September 24, 1974, Lucas County Case 74-0982, exhibit of

show-cause supplemental amendment (doc 38), May 16, 1975: 'all charges and events that form base of action against petitioner arose in Franklin County * * * with petitioner moving Lucas County Common Pleas Court for change of venue to Franklin County where claim for relief arose, * * * wherein alleged malicious prosecution of plaintiff (Aman) took place, as petitioner has never resided in Lucas County and has never conducted any business of any nature in Lucas County * * *. (app p92);

Counsel Jacobs for Aman contends that site of arrest in Lucas County governs venue for his actions of alleged false arrest and malicious prosecution * * * despite substantive Ohio law to the contrary and despite arrest procedure regulated by Ohio Revised Code, on criminal procedure, totally out of any control or influence of petitioner, as evidenced by Writ of Mandamus 73-923 of Ohio Supreme Court, dated November 19, 1973, to effect arrest of Aman on warrant issued from Franklin

County Sherrif Department on September 17, 1973.
(app p91).

f. Affidavit re pertinent proceedings after Hearing, May 27, 1975 [included as part of (doc 46) motion February 6, 1976 to vacate Order (doc 43), December 29, 1975]: "Immediately following May 27 hearing petitioner attempted to locate and obtain copy of source paper, document, or record of communication court presented as from George Snyder.

Petitioner, twice, in presence of newly starting Cincinnati Post reporter, William Tom Aubrey, requested copy of source message and details of communication received by the court - from court secretary, Betty Kinsey. Requests were made: (1) once in presence of court reporter, Roger Yenke, and (2) once in presence of court clerk, Dan Lyons, both in presence of Post reporter. (app p153). Secretary replied that there was no wire, no telegram, no document, nor record of any call received, nor of source phone

number. That she did not recall receiving any phone call but that it must have been from someone representing himself to be George Snyder from somewhere in Florida. That in whatever manner the Court indicated the message had been received, and its contents, would have to stand as she could not recall the incoming call, nor any of details.

Court clerk, Dan Lyons, obtained File 8155 from Judge's chambers and check of file did not reveal any source message, nor any message that could be copied. Clerk returned file to judge's chambers." (app p154)..

On conclusion of May 27th Hearing, petitioner requested copy of transcript from court reporter as soon as feasible. Court reporter filed 9-page transcript August 18, 1975 (doc 41) (app p154), thereafter mailing copy to petitioner in response to petitioner's oral and written follow-up requests of August 15, 1975. (doc 42).

g. Fraud and conspiracy - Res Ipsa Loquitor!

By reference, Petition for Writ of Certiorari, Amended-complaint (doc 8), Affidavits-Exhibits, and proposed amendments-joinder and discovery - - - all unopposed!

h. April 1, 1976 petitioner's motion to District Court to Stay proceedings pending appeal and revisions relating to several specific docket entries for them to more accurately reflect the nature, contents, and appropriate time of entry pertaining to Answer, Orders, and other entries * * * (app p169-174).

5. Question 5 - re lack of counsel:

28 USC sec 1654 does not appear to require non-corporate petitioner to give indication or show that he cannot afford to obtain counsel nor explain his failure to do so. Neither has District Court made any specific requests of petitioner to do so. Since the question has indirectly surfaced in various orders, petitioner admits affordabil-

ity of counsel is a concern, especially as petitioner is denied as to amendments-joinder-discovery. With sizeable contract-investment-loss and petitioner's efforts to salvage operations despite continuous misrepresentations, deceit, and fraud.

a. Efforts to secure services of attorney, even solely for purposes of default judgment have been unsuccessful. Record (appendix and exhibits) 'on appeal' found 'incomprehensible' by Court of Appeals; - since over one-half of record pages are specifically referenced by appeal brief (and rehearing petition) with balance thereof relating to documents and exhibits pertaining to denied discovery-joinder-amendments - the complete record of (76-1750) provided a full picture of happenings therein. To average-attorneys, sought by petitioner, declining to act in matter - apparently finding 'picture too clear' as to contrary to rule proceedings. Appendix S and T outline record 'on appeal'. (pgs 55a, 62a).

6. Question 6 - re Orders on Appeal:

a. District Court, Order, March 14, 1974 (doc 35) saying: "It appearing that this case is on appeal, this Court has no jurisdiction and it therefore denies plaintiff's motions (doc 31; January 14, 1974) to Make Findings of Fact and Conclusions of Law, and motion to vacate (doc 32; January 18, 1974) re magistrate's report and judgment order thereon (of dismissal with prejudice) and to Stay Proceedings * * * "

(1) wherein, petitioner's Notice of Appeal (doc 33; January 24, 1974; app p70), after contact with clerk's office, states: 'with magistrate's refusal to consider, or to make entry to deny or grant, motion of plaintiff January 14, 1974 re Fed RCivP 41(b)- Involuntary Dismissal and Rule 52(a) (b) for Findings of Fact and Conclusions of Law' * * *. (a) with Court of Appeals 74-1174, October 14, 1974 (Appendix F; doc 36; app p71-73) saying: " * * * it appears that acting on recom-

mendation of Magistrate, District Judge entered an order - - that this case be dismissed with prejudice, unless within 30 days plaintiff submits an application for default judgment. We conclude that such a conditional order is not a 'final order' (app p159). The Question of whether in issuance of said order the District Court abused its discretion will be presented in event a final decision is entered by District Court * * and comment on that issue seems appropriate.

At the very least, refusal of a party to comply with discovery is scarcely ground for denying subsequent motions for discovery. * * * Magistrate has expressed view that plaintiff appeared to prefer success in conducting discovery proceedings to obtaining judgment. * * * A clue to alternative relief may be found in prayer of December 15, 1972, amended-complaint (doc 8), wherein plaintiff includes prayer for specific performance. (app p84-85, p87)."

b. With Court of Appeals 76-1750, March 25, 1977 (Appendix A) saying: " * * * after numerous efforts to assist O'Brien in presenting his action, the District Court dismissed the suit without prejudice. O'Brien appeals. The Court concludes that decision of District Court must be affirmed. * * * O'Brien has demonstrated his inability to present his case without assistance of counsel * * * . "

(1) Notwithstanding: - timely, 15-page limitation, Petition for Rehearing, (Appendix N - with same fully referenced to record) wherein: " with neither appellee nor appellee's non-local counsel, A David Gomborov, responding to appeal court's docketing letter, June 10, 1976, nor to appeal court's letters of September 24 and November 10, 1976, that: 'This Court requires an appellee's brief be filed in this matter.(Appendix N). '

Except for legal advice given petitioner by deputy clerk of court, July 5, 1972 through Sep-

tember 8, 1972, for forwarding to petitioner's counsel on how to proceed re Interrogatories, Pretrial, Summary Judgment, etc., in addition to 'No Answer' (record p108) - the record does not show any (numerous) efforts by District Court to assist petitioner in this matter.

From these prevailing conditions through petitioner's subsequent efforts re motions for amendment-joinder-discovery, through court's unannounced reference and no-response to questions pertaining thereto, with defendant's non-appearance at show-cause hearing, where George Snyder gave-throughCourt-projected-message of non-existence, non-operating, no-counsel, verge of bankruptcy, second mortgage, and forfeiting of franchise * * *

c. with Court of Appeals, Order (Appendix B), May 10, 1977, stating: " * * * it not appearing that Petition (Rehearing) raises any matter not previously considered by Court, it is ordered that the Petition be and it is hereby denied."

VI. AMPLIFYING REASONS FOR ALLOWANCE OF
WRIT OF CERTIORARI

A. Question 1 - re Discovery Efforts:

Notwithstanding Magistrate's unannounced reference No. ____ and Orders relative thereto, and show-cause Order, May 2, 1975, - - Fed R CivP 37(d) concludes by making it clear that George Snyder, President, Dutchie, Inc., may not remain completely silent.

If he desires not to respond or not to speak, he must apply to Court for protective Order under under Rule 26(c) and/or Rule 37(d). (app p52; doc 38).

The party has a duty to answer. Purpose of Fed Rules Civ P is facility in procuring evidentiary details and a corporation is no more entitled to

avoid discovery than an individual. If discovery should be blocked or resisted with impunity the benefits to be derived therefrom would be lost. Sanctions are a necessary element in * * * discovery and policy permitting discovery requires * * * sanctions be enforced. (app p52; doc 26).

Failure to make discovery, Fed R Civ P, requires an Order that matters regarding which the Order was made, or any other designated facts, shall be taken as established for purpose of this action in accordance with claim of party obtaining the Order. And requires an Order refusing to allow disobedient party to oppose such designated claims. (app p85; doc 38).

District Court fails to issue such orders * * * even when (order) is specifically detailed per local rule 17(f) - included in motion to compel discovery (doc 18), February 13, 1973, to wit:

"motions to which objections are not seasonably (timely) filed, may be granted as a matter

of course, as will orders directing answers to interrogatories. Failure of defendant, George Snyder, Dutchie, Inc., to comply with directions herein shall entitle petitioner to obtain answers, documents, and proof of admissions * * * at expense to defendant * * * at time periods appropriate to petitioner." (app p40-41)

1. It would appear show-cause Order directing defendant to respond to petitioner's request for admissions (and genuineness of documents) of November 28, 1972 and January 23, 1973 is not part of sanctions for failure to make discovery, since these matters already stand admitted, especially when time lapse - extends beyond April 15, 1975 (doc 38).

a. Where petitioner has filed request for admissions of truth of fact which follow averments of amended-complaint (doc 8), on failure of defendant to answer within 30 days after service of same (November 28, 1972) the averments are con-

fessed. Court has no power to compel answers to Rule 36 - admissions (app p86, p133).

b. An officer acting on behalf of employer corporation, even alter-ego Dutchie, Inc., is always liable to third party for any torts committed and also damages to other party through his negligence and failure to obtain counsel. (app p110, p141), failure to qualify corporation, denying existence of counsel (A David Gomborov), ad infinitum.

B. Question 2 - re joinder-amendment motions:

In suits to avoid effect of fraudulent contracts, both nature of proof and amount of recovery depend on claims made and revealed in pleadings which establish boundaries of the suit. (35A CJS p348; app p85, doc 38; app p135-136).

COURT: I don't think you need to read that. We'll have to read it and see what amendments you were going to make. We were of opinion that the only relief you could get was against Dutchie, Inc. I don't know whether your pleadings can be amend-

ed at this late date to include anyone else. (Tp-p8, May 27, 1975, app p121, 131, 140).

O'Brien: They (were) tried to be put into the case a year and half to two years ago. It was endeavored to make these amendments and expand the case to include my former counsel and officers and directors of Dutchie, Inc. (Tp-p2; app p 115, p131, 140).

FEDERAL RULE, 1966 Amendment:

When persons ought to be parties if complete relief is to be accorded have not been made parties, Court shall order them (and insurance companies) summoned to appear in the action * * * parties may be dropped or added by Order of Court on motion of any party or on Court's own initiative, at any stage of the action. (app p164).

2a. a foreign corporation * * * has been viewed as a defacto corporation - notwithstanding its failure to comply with statute of State of incorporation requiring payment of annual license tax and declaring that (Dutchie) corporation failing

to pay tax (March 1, 1974): 'shall forfeit its charter' (36 Am Jur2d p42).

(1) with respect to foreign corporation * * * it has been held that statutory provisions of "any power under authority of such corporation, after issuing of Governor's proclamation of delinquency in payment of license taxes" - was not intended to interfere with right to sue an expired or dissolved corporation or to prevent appearance on its behalf in such a suit. (Lively v Picton, 218 F 401 13 0 Jur2d p604).

(2) * * * non-resident officers and directors have been necessary * * * parties to suits for fraud (35A CJS p55, p157; app p163).

(3) * * * statutes have been enacted providing for personal liability of stockholders upon contracts of foreign corporations entered into when such corporation had not complied with constitutional and statutory qualification for doing business in that State (Ohio). One who deals with

such foreign corporation * * * is not thereby estopped from denying its right as a corporation in the State, and asserting individual or partnership liability against its stockholders * * * but individual liability * * * is limited to obligations arising out of business within the State. (36 Am Jur2d sec 436 - foreign corporation).

(a) when members of a corporation misuse the entity, courts look behind that entity that is alter-ego for every fraud and deceit which result in damage to a party. The principle is one of natural justice, long recognized in law. (app p141), (25 0 Jur2d p183).

(b) George E Snyder, founder of company, President since its incorporation in October 1966, (p11-12 Dutchie, Inc. Securities Prospectus, 1969; app p142).

(c) 1969 Annual Report, Delaware Corporation shows date of incorporation as December 16, 1969 (app p156). George Snyder may be deemed founder

and parent * * * as these terms are defined in Securities Act 1933 as amended (p11-12 Securities Prospectus; app p157).

(d) an officer or director cannot avoid personal liability if he is moving (dominating) conscious force behind the (infringement). (Marks v Polaroid Corp., 237 F 428; app p141).

2b. An attorney and law firm has certain obligations to his client - when he negotiates a contract and files suit on that contract - of honesty. He is bound to perform those obligations with skill and care, and upon his failure to perform those obligations he may be sued for violation of contract or for negligence, or for perpetration of any fraud upon his client. (app p144) (Am Jur 2d p121).

(1) and in defrauding his client by means of false and misleading statements, invoicing, and knowingly giving false advice. (7 CJS p744; app p144)

2c. Supplemental amendment (doc 38) is proper means of bringing before District Court relevant legal proceedings in another court (app p83) and District Court may consider Bill of Exceptions in related court action, Lucas County 74-0982 (app p136).

(1) As indicated in Writ of Mandamus 73-923, p8 thereof: 'raising possibility that acts herein could be one of successive torts, separated in time, place, or source, constituting a series of occurrences' - language not unlike Fed R Civ P for permissive joinder of parties * * * (app p79)

(2) where supplemental amendment * * * shows general wrong suffered and general continuing conduct causing wrong - - being controlling consideration and therein showing-cause, where under civil action petitioner may in a single action seek any and all relief to which the facts entitle him. (35A CJS p829) (app p87, p137).

(a) petitioner will file supplemental amendment plus affidavits, exhibits, and attachments on by-leave of court and thereon will forward additional discovery items pertinent thereto. (app p76).

(b) since no ruling on show-cause motion (doc 38) of May 16, 1975 was forthcoming until the default-alternative order of December 29, 1975, petitioner did not file rough-drafted joinder addendum thereto including Toledo participants.

(c) in the interest of justice * * * when evidence creating new issues is received without objection the pleadings may be considered to be amended to include the new issues without formal motion (Commissioner v Finley, CA 10, 265 F.885) (app p162).

(d) Mandate of Civ R 15(A) as to amendments requiring leave of court, is that: 'leave shall be freely given when justice so requires', * * * and

where amendment is tendered timely and in good faith, and no reason is apparent or disclosed for denying leave, denial of leave to file such amended complaint is an abuse of discretion. (Peterson v Teodosio, 34 O Jur2nd p^{supp}_____, Ohio Civ R 15A).

2d. Under Rules of Civil Procedure the names appearing in the caption of case do not determine who are the parties to the suit; whether or not a defendant is properly in the case hinges upon the allegations in body of (amended) complaint (doc 8) (Gibbs v Lemley, 33 O App2d, 220 (1972); Rule 10A-1976 Supp-Ohio Rule Civ P):

(1) (doc 8) par 2a: " during meeting of May 26, 1970 * * * agreement basis was reaffirmed * * * George Snyder affirmed that new, patent-pending, unique ovens * * * were ready to go, that these had been field-tested for six months and revealed no problems while performing their job well."

(a) parties-defendant and others specifi-

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cally named in amended-complaint (doc 8), December 15, 1972, may be made parties - even for limited purpose of discovery, and tendency under FRCP is * * * to encourage use of discovery proceedings to apprise parties of basis of claims made in pleadings. (Stromiller v Merrill, Lynch, Pierce, Fenner and Smith, 54 FRD 396; Ohio R12).

C. Question 3--re orders of dismissal as to (conditional) default judgments:

Before a party or his counsel may be subject to sanction, on failure to make discovery, such party or counsel must be in default of Order of Court which is properly announced and formally entered. (Sexton v Sugar Creek Packing Co., 38 O App 2d 32; Ohio CivR37 supp), and party (petitioner) - must move for order to compel discovery which must be disobeyed, before movant may obtain a default judgment as a discovery sanction. (State Auto Ins. Co. v Chrysler Corp., 36 OS (2d) 151, Ohio R37).

1. Wherein District Court did not timely

issue, nor enter, proper order on motion to compel discovery, January 23, 1973 (doc 16), nor on motion for order to impose sanctions, February 13, 1973 (doc 18), (app p85).

a. Absent from Fed R Civ P 8(a) is old requirement of common law that a pleading set forth facts constituting a cause of action. (Diogurio v Durning, 139 F2d 774); clear purpose of FR 8 is notice-giving and not to formulate issues or summarize facts involved. (Clausen & Sons, Inc. v Theo Hamm Brewing Co., CA 8, 395 F2d 388; app p 161); orders - Appendix C (doc 48) and Appendix D (doc 43) notwithstanding.

(1) Petitioner can amend complaint on basis of newly acquired knowledge relating to his amended-complaint (doc 8) (35A CJS p520) re (doc 38; doc 46; etc.) and under Rule 15 * * * refusal to permit amendment must have a justifying reason (Anderson v American Oil Co., 60 FRD; Ohio R 15A).

(a) where court fails to give justify-

ing reasons for denial - - as shown by examining procedural history of case which reveals such delay and such conduct by defendant, George Snyder, as Dutchie, Inc. or otherwise.

(b) It was held that court abused its discretion with respect to dismissal of an action, where such dismissal was clearly inappropriate under the circumstances, because petitioner was not chargeable with fault * * * and proceedings had therein was in such posture that petitioner was entitled to judgment in his favor. (18 O Jur2d p213, p215) (app p159).

D. Question 4 - Characteristics of Rule 59 for New Trial and Rule 60(B) for Relief from Judgment delineate conduct and proceedings, as shown - by reference, page 10 through page 41 herein and INDEX hereto, being supplemented by VI - Amplifying Reasons for Allowance of Writ, to complete this tapestry of misrepresentation, deceit and fraud.

1. Ohio Uniform Commercial Code, Chapter 1301

wherein every contract or duty under the Code imposes an obligation of good faith in its performance or enforcement, explicit standard of not only honesty in fact and effective use of bad faith to escape performance of original contract terms is barred. (app p53-56, doc 26; app p149).

In Ohio, when fact of conspiracy has been prima facie established, everything said, written, or done by anyone of the co-conspirators while conspiracy was in progress and in furtherance of the common design or purpose, is deemed to have been said, written, or done by every one of them, and is admissible in evidence against each other, in both civil and criminal cases. (10 O Jur2d p75) (app p163).

a. All parties to a conspiracy are jointly and severally liable for damages occasioned by its wrongful combination * * * it is not necessary that conspirators know about all the details and agreement in order to hold them liable for acts

committed in pursuance of the details. (app p163).

(1) Every participant in alleged fraud may be joined, even if only for purpose of discovery when petitioner alleges that it was done in pursuance of conspiracy or acting in concert. (10 0 Jur2d p70-71) (app p163).

(a) where two or more persons by concurrent acts violate a common duty owed another * * * they may be held liable for total damages and petitioner may proceed against one or join two or more in a single action. (English v Aubry, 90 App 121; RC 2309.58 or Ohio Civ R15B) (app p163).

- even when it extends to Toledo, Ohio as petitioner's memo, May 6, 1972, to prior counsel: 'attached referenced material should be self explanatory. Attachments cover Zayre-Rink snafu. What is status of Pretrial Order No. 1 ? Is there a Time-line on this ? (app p103, p136). Zayre-Rink snafu later to develop into Lucas County void, falsely-obtained, default judgment - - - - -

against petitioner wherein Lucas County did not have jurisdiction of petitioner nor of subject matter, nor proper service and process, but DID HAVE false-Answer entries in docket sheets, without termination of alleged-false arrest action in favor of Mike Aman, with default judgment issuing on false testimony. (app p____; doc 38).

E. Question 5 - re lack of counsel:

With respect to prosecution or defense of actions * * * a foreign corporation must be held to same diligence in all respects as a domestic corporation or an individual citizen. (36 Am Jr2d sec 462).

Dutchie, Inc., alter-ego George E Snyder, by reference - p44 herein: an officer acting on behalf of employer corporation is always liable to third party for any torts committed and also damages to other party through his negligence and failure to obtain counsel (app p110) * * *

1. Maryland newspaper article, October 9, '74

" * * * This kind of adverse publicity will cost Dutchie thousands of dollars in legal fees * * * because it means other creditors will ask questions and will cause lawyers to nitpick, he said."

F. Question 6 - Orders on Appeal:

Rules of Procedure * * * most important purpose is to facilitate administration of justice within Federal Courts. We employ the adversary system in which parties are to contest all issues * * * to develop comprehensive relevant facts within the framework of rules of evidence. (United States v Nixon, 41 LED 2d 1039 (1974) at page 1064 94 S Ct 3090; 418 US 483).

1. So as to avoid Manifest Plain Error and - to insure right of plaintiff to present his suit to a final determination - which cannot be arrested, defeated, or impaired, by fact that after action is begun the defendant does not continue to resist petitioner's demands or to admit acknowledge

-ability, and jurisdiction once obtained is not terminated by fraud upon the courts. (36 CJS p138) (app p88, doc 38; app 133).

The wrongful or fraudulent destruction of an equitable right, specific performance, is a loss, a damage to the owner of such right, and it is subject to redress * * * for such damages. It also must be recognized that many litigants and their counsel may not properly be allowed to disregard, with impunity, the processes of the court (30 CJS p836; 35B CJS 678).

2. Manifest Error of Law (appeal brief 74-1174) and continuing: There are constitutional limitations on powers of courts to dismiss and thereby deprive a party of opportunity for hearing on merits of his claim. Failure of the court to apply proper legal measure of damages is a manifest error of law. (p17).

a. a forced election defeats legal rights and remedies due petitioner and judgment may not

rest on conjecture and speculation (magistrate's unannounced reference) (p17).

3. An application to vacate an order of dismissal should be by motion and a complaint involving a contract is usually not subject to dismissal if petitioner is entitled to any relief under the facts pleaded. (35A CJS p390; 35B CJS p494; 35 CJS p64), (p17).

a. Where jurisdiction is based on diversity of citizenship, Federal District Court must pass on merits of case, that would entitle petitioner to a fair trial on the merits in a State court. (p18).

(1) Substantial justice cannot be done by a judgment which denies a party legal and constitutional rights, and it is to be applied where there was a fair trial and not as a means of avoiding requirements of law. (ORC 2309.59; Knabb v Schere, 45 App 535), (p16).

b. * * * equity having obtained juris-

diction of a case will retain it to do complete justice, to the end that the aggrieved party may be put in as good a position as if the other party had fully performed. (30 CJS p930; UCC 1-106A) (p15).

(1) * * * to oust equitable jurisdiction, the remedy of law has been required to be so complete that it attains the full end and justice of the case, reaching to the whole mischief and securing the whole right of the party. (30 CJS p967, p831). (p16).

7. Under Color of Office - every person, who, under color of any statute * * * subjects or causes to be subjected, any citizen of U S * * * to deprivation of any rights, privileges, * * * shall be liable to the party in an action at law * * *.

a. Under Color of Office * * * under civil rights includes judicial action (42 USCA sec 1983; 23 V and L Rev 413 (1970)).

b. Where rules and limits exist, discretion-

ary actions are reviewable, if there has been a subversion of Civil Rules Procedure, rules or principals that confer a right on a party (5 AM Jur2d p515). Official conduct of every governmental agency * * * and judicial * * * toward every person must comply with TEST of due process of law, and due process (or due course) implies a due course of legal proceedings according to those rules and forms which have been established for protection of individual rights. (11 0 Jur2d p46, 48).

(1) Guaranty of due process of law was designed as security against arbitrary action * * to exclude arbitrary action from every form of government - - arbitrary action constitutes denial of due process. (11 0 Jur2d p48).

(a) The presumption of validity may be overcome when it is so inconsistent with record pleadings, filings on removal from Hamilton County Common Pleas Court - as to constitute prejudicial

error. (Hahn v Hahn, App 75 OL Abs 81; 3 0 Jur2d supp-1970).

c. Where motions (to vacate conditional dismissal orders) for relief from such judgments sets forth facts sufficient to constitute grounds for relief from such judgments (orders), and it is timely filed, court abuses its discretion in overruling such motion. (Matson v Marks, 32 0 App 2d 319).

(1) Where decision of trial court is carried over into Transcript (of show-cause Hearing, May 27, 1975) and exemplifies the errors, it is not necessary to file a Bill of Exceptions. (Byrd v Ingall's, 76 Abs 355).

(a) * * * Rights embraced in procedural due process * * * opportunity to be heard * * in hearing which is adequate and impartial (10 0 Jur2d p62) - - unlike May 27, 1975 and events subsequent thereto as shown by Affidavit re Tp - Appendix R, p47a-54a).

d. An examination as to matters occurring since action began may be permitted, particularly where pleadings (doc 8; doc 26; doc 38; doc 40; & doc 46) etc. allege continuing wrong. (35 CJS p122)

(1) It is fundamental that every Court has inherent power to do all things that are reasonably necessary for administration of justice - to protect itself against perpetration of fraud - the Duty to exercise such power. (10 0 Jur2d p360).

(a) abuse of process may result from fact that a legal procedure (Lucas County, Hamilton County Municipal Court, etc.) has been used against petitioner with malicious intent of injury or to harass him. (1 Am Jur2d sec 9).

e. Where facts show such a correlation of circumstances, such a dove-tailing of incriminating evidence, and such logical development of suspicious acts and situations * * * there is no want of probable cause. (35 0 Jur2d p515).

(1) Judge may exercise power of judicial dis-

cretion but this discretion power does not give Judge the right to refuse guarantees of Constitution to persons who appear as litigants before him * * * (10 0 Jur2d p369).

(a) * * * Constitutional question is raised in a civil action in which a right is * * * denied. (10 0 Jur2d p214).

f. There are some cases, in which it is not only a right, but also a Duty of reviewing court to consider alleged errors, whether objected to or not - - as there may be defects in the procedure of such nature and character as to prevent (petitioner) from having a fair (six-year) hearing. (30 CJS p836).

(1) Power conferred by legal process may not be used or exercised * * * with oppressive hardship to another. (1 Am Jur2d sec 9).

(a) * * * unconscionable advantage taken * * * by wilfull or intentional acts, omissions, and concealments - - which include breach

of Duty, Trust, or Confidence justly reposed.
(30 CJS p880).

g. Question * * * was whether an inhabitant of State (Ohio) had been deprived of Federal (and Ohio) constitutional rights by one acting 'under color of office' (10 0 Jur2d p167).

(1) Provisions of Federal and Ohio Bill of Rights defining constitutional rights of all persons to equality of justice * * * are self-executing * * * (10 0 Jur2d p167).

(a) (State courts, equally with) Federal Courts bear Duty and Obligation to enforce and protect every right guaranteed and secured by the Constitution of United States. (10 0 Jur2d p191)

8. Entries Pending Filing Writ of Certiorari:

a. District Court, August 6, 1977, by insured mail, return receipt, of Order dated August 1, 1977 with check dated August 4, remitted petitioner's \$ 250.00 cash bond deposited on appeal 74-1174, January 24, 1974 (which continued on deposit and pro-

vided bond on appeal 76-1750, April 20, 1976).

b. Petitioner's motion for Stay of Mandate of Court of Appeals denied August 8, 1977 by this Court. Wherein, Court of Appeals conditioned such Stay on: 'Petitioner filing therein, within 30 days, a (1) certificate of Clerk of Supreme Court that petitioner had filed therein: (a) certiorari petition, (b) record, and (c) brief pertaining to Writ;' contrary to Rules and requirements of Supreme Court. (Appendix W, 82a).

c. A copy of Notice of Extension to file certiorari was filed with District Court, August 15, 1977.

d. Order (doc 53) entered July 28, 1977 by District Court, same as (Appendix A) as Mandate of Court of Appeals, with notations thereon:

" Issued as mandate: July 26, 1977; Costs: None " but not (sent) or received by petitioner until copy of docket sheet obtained from clerk August 15, 1977 and petitioner specifically requesting (doc 53).

e. District Court Order No. 1: IN RE United States Magistrates (filed June 22, 1977; in Court Index August 11, 1977; Appendix X, 83a-84a and below):

" * * * Following Rules supercede prior orders entered July 16, 1973 (Appendix V) and September 2, 1971 (Appendix U) * * * and these orders are hereby vacated. WESTERN DIVISION RULE 1 - -

UNITED STATES MAGISTRATE: * * *

1.2 Additional Duties: * * *

(8) issue subpoenas, writs of habeas corpus, * * * or other orders necessary to obtain presence of parties * * * or witness or evidence needed for court proceedings;

(13) institute proceedings against persons violating certain civil rights statutes re 42 USC sec 1987 and 1989 * * *

(15) consider motions related to * * * leave to amend pleadings or to file amended-complaint, * * * to add parties * * * to set aside default judg-

ment, after conducting such hearings as may be required * * *

1.3 Nondispositive Pretrial Orders:

(A) Notwithstanding any provisions of law to contrary: (1) Magistrates may hear and determine any pretrial motion or other pretrial matters, except: (not excluded by USC sec 636(b)(1)(A)).

All motions, objections, etc. arising in discovery under Rules 26-37 FedRCivP and which become submitted under local Rules * * *

(2) Any party may appeal from Magistrate determinations * * * within ten days after issuance of Magistrate's Order * * *

1.4 Dispositive Pretrial Motions: * * *

(1) Magistrate may hear and conduct such evidentiary hearings as are necessary or appropriate, and submit to Judge proposed Findings of Fact and recommendations for disposition of motions and matter excluded by USC sec 636(b)(1)(A).

(2) Any party may object to Magistrate's pro-

posed Findings, recommendations, or report * * *
within ten days after being served a copy thereof.

1.5 Special Master's Reference: * * *

(1) Magistrate may serve as special master subject to procedure and limitations of 28 USC sec 636 (b)(2): (assistance to District Judge in conduct of pretrial or discovery proceedings in civil or criminal actions) and Rule 53 (Masters) FRCivP; (and by reference, p31 re Appendix U & V).

VII. A. CONCLUSION:

For the reasons contained herein Certiorari should be granted.

Respectfully submitted.

Wilson O'Brien
 Wilson O'Brien, pro se

B. CINCINNATI LEGAL DIRECTORIES

1974

1975-76

BRUMLEVE, DeCAMP & WOOD
 721-1350
 1420 Central Trust Twr

BRUMLEVE, DeCAMP & WOOD
 721-1350
 1420 Central Trust Twr

Wilson L. Brumleve
 David C. Wood

Wilson L. Brumleve
 David C. Wood

Edwin J Deibelbis
 Richard H Pennington

David Wade PECK
 Richard D. Lameier

Thmoas A. Zins
 Gorden F. DeFosset
 Richard D. Lameier
 David Wade Peck
 James C. Cissell

Gorden F. DeFosset, of
 counsel -
 Tom Zins, of counsel
 James C. Cissell
 Richard S. Trautman

James Cissell being promoted as front runner for new U S Attorney for Cincinnati. Thomas Zins for past several years has been General Manager of Hudepohl Brewing Co. (client of firm). Richard Pennington not indicated as still being with the law firm.

C. AFFIDAVIT: CERTIFICATE OF SERVICE

STATE OF OHIO, COUNTY OF HAMILTON, SS: In matter herein of Certificate of Service, petitioner, Wilson O'Brien, being duly sworn on oath this 1st day, September, 1977 states that pursuant to Rules of Practice of United States Supreme Court, Rule 33, service will be made by insured air mail return-receipt, of (3) copies of Writ of Certiorari on all parties required to be served:

(1) George Snyder, President, Dutchie, Inc., (two copies), and (2) A. David Gomborov, 112 East Lexington Street, Baltimore, Maryland, 21202 (one copy), on the 6th day, September, 1977.

Wilson O'Brien
Wilson O'Brien, affiant

Subscribed and Sworn to before me,
this 1st day, Sept, 1977.

Edna E. Hittner, my commission
Notary Public, State of Ohio expires: Jan 4, 1978

1a

(Ex A)

NO. 76 - 1750

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN
plaintiff-appellant

- v -

DUTCHIE, INC.
defendant-appellee

ORDER
(Mar 25, '77)

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY,
Circuit Judges.

This appeal has been assigned for consideration pursuant to Sixth Circuit Rule 3(e).

A previous appeal to this Court by Wilson O'Brien was dismissed on the ground that the order from which the appeal was sought to be perfected was not a final order. O'Brien v Dutchie, Inc. (No. 74-1174, October 14, 1974). We pointed out that the record on that appeal "all but defies comprehension" because of fact that O'Brien insisted on acting as his own attorney despite recommendation of District Court that he employ counsel. This court echoed (the urging) of Dis-

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trict Court that O'Brien obtain counsel. After remand, O'Brien persisted in serving as his own attorney, filing numerous motions and other documents which further complicated an already complicated record. After numerous efforts to assist O'Brien in proceeding with his action, District Court dismissed the suit without prejudice. O'Brien appeals. Upon consideration, this court concludes that decision of District Court must be affirmed pursuant to Sixth Circuit Rule 8. O'Brien has demonstrated his inability to present his case without assistance of counsel.

There is no indication that he cannot afford to retain counsel and he has offered no explanation of his failure to do so. The papers filed by O'Brien in District Court after our former remand are as difficult to interpret as those previously filed. It is obvious that a second remand by this court would be an exercise in futility. It being manifest that the questions on which the decision

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of the cause depends are so unsubstantial as not to need further argument. It is ordered that the judgment of the District Court dismissing the action, without prejudice, be and hereby is affirmed.

Entered by Order of the Court.

John P. Hehman
Clerk

4a

NO. 76 - 1750

(Ex B)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN
plaintiff-appellant

- v -

O R D E R

DUTCHIE, INC.
defendant-appellee

(May 10, '77)

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY,
Circuit Judges.

Upon consideration of plaintiff-appellant's
Petition for Rehearing, and it not appearing that
the Petition raises any matter not previously
considered by the Court. It is ordered that the
Petition be and hereby is denied.

Entered by Order of the Court.

John P. Hehman
Clerk

5a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex C)
(doc 48)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
O R D E R

(Mar 22, '76)

By order dated December 29, 1975 the Court or-
dered that this case be dismissed, without pre-
judice, unless within 30 days from date thereof
plaintiff applied for default judgment, or in the
alternative, asked for and obtains leave to file
amended complaint which seeks to add parties-de-
fendant and states facts upon which relief can be
granted * * * (doc 43). Plaintiff filed memorand-
um (doc 44) which the court treated as motion for
time extension and this was granted (doc 45).

On February 6, 1976 plaintiff filed doc(46)
with numerous exhibits; entitled "(1) objections
to, and motion to vacate order (doc 43) re dis-
missal without prejudice, (2) motion to incor-

porate matter herein as addendum no. 1 to (doc 38) of May 16, 1975. * * * * one can glean that plaintiff asserts that his case should not be dismissed * * * because he has tried to supplement his pleadings and has not been permitted to do so. He asserts he has tried to expand his original case to include (officers) and directors of Dutchie, Inc., his former counsel (and firm of Brumleve, DeCamp and Wood), also people in Toledo * * *.

This court's order (doc 43) December 29, 1975 speaks for itself. * * * we see nothing in his submissions which seeks to name anyone but (Dutchie, Inc.). We * * * must conclude that plaintiff has shown no cause why this case should not be dismissed for lack of prosecution (to accept conditional default judgment). We are still of same point of view. Plaintiff has not * * * applied for default judgment, or in the alternative, asked for and obtained leave to file amended complaint which seeks to add parties-

defendant and states facts upon which relief can be granted * * *. The within action is dismissed - - such dismissal being without prejudice and at plaintiff's costs!

(record p167-168a)

David S Porter
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex D)
(doc 43)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
O R D E R

(Dec 29, '75)

This cause came on for hearing on this Court's order (doc 37, May 2, 1975) that plaintiff show cause why this action should not be dismissed, in view of fact that this court has held (magistrate reference) that plaintiff is entitled to default judgment but plaintiff has not made application for one under Rule 55. Instead * * * plaintiff

filed May 16, 1975 (doc 38) and the attachments are explained on cover page * * * plaintiff moves 'to include supplemental amendment * * * to amended complaint (doc 8) of December 1972'. He also files an affidavit as way of objecting to court's order of May 2, 1975 (doc 37) which came on for hearing May 27. Plaintiff still seeks specific performance of the agreement * * * and damages. (see pp8 and 9 of amended complaint doc 8 attached to motion doc 38).

At show cause hearing plaintiff appeared pro se. He expressed desire to sue his former attorneys and officials of defendant (Dutchie, Inc.) but we see nothing in the submission which seeks to name anyone but Dutchie, Inc. * * *.

The defendant (notwithstanding show cause order) did not appear through counsel or official. As indicated * * * an official (George Snyder) * * * did telephone the Court and advise that defendant company was no longer in existence.

This information was passed on to plaintiff in open court at the hearing * * *. Under the circumstances the Court * * * must conclude that the plaintiff has not shown cause why this case should not be dismissed for lack of prosecution - for failure to apply for a default judgment. It is Ordered that the action is dismissed, without prejudice, unless within thirty days from date hereof the plaintiff applies for default judgment or in the alternative: asks for and obtains leave to file amended complaint which seeks to add parties-defendant and states facts upon which relief can be granted * * *.

So Ordered: David S Porter
Judge

(record p123-124a)

10a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex E)
(doc 37)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
O R D E R
(May 2, '75)
(3:40 PM)

The Court of Appeals ordered that the cause be remanded to us * * *. In view of remarks by Court of Appeals * * * we take the following action.

1. Prior order of January 7, 1974 is hereby ordered vacated to extent that it provides case be dismissed with prejudice unless within 30 days the plaintiff submits an application for default judgment.

2. It is ordered that on May 27, 1975 * * * plaintiff show cause why this action should not be dismissed * * * as plaintiff has not made application for one under Rule 55 of Fed R Civ P.

3. Plaintiff's application for entry of order

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to impose sanctions on failure to make discovery (doc 18), filed February 13, 1973, is granted.

Defendant is Ordered to answer plaintiff's interrogatories dated November 28, 1972 within 20 days from date of this order (May 2, 1975).

Defendant is Ordered to produce documents in accordance with request to produce of November 28, 1972 within 20 days of this order.

Defendant is Ordered to respond to plaintiff's request for admissions dated November 28, 1972 * * * ; defendant is also Ordered to respond to plaintiff's supplemental interrogatories and requests of * * * January 23, 1973.

In event defendant fails to comply with foregoing regarding discovery, defendant will be required to show cause at hearing * * * why it should not be held in contempt * * *.

David S Porter
Judge

(record p74-75)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITWILSON O'BRIEN
plaintiff-appellant

- v -

DUTCHIE, INC.
defendant-appelleeNO. 76 - 1750
O R D E R

(Oct 14, '74)

BEFORE: PHILLIPS, Chief Judge, and PECK and LIVELY
Circuit Judges.

This appeal has come on for consideration pursuant to Rule 3(e), Rules of the Sixth Circuit.

It appears that acting on recommendation of Magistrate the District Court entered an order providing: "that this case be dismissed with prejudice unless within 30 days plaintiff submits an application for default judgment." We conclude that such conditional order is not a 'final decision' within meaning of 28 USC sec 1291 (see generally, Wright, Law of Federal Courts, 2d Ed sec 101) and that since this appeal was attempted to be perfected therefrom, it is not properly be-

fore us. The Question of whether in issuance of said order the District Court abused its discretion will be presented in event a final decision is entered by District Court and an appeal perfected therefrom and comment on that issue therefore seems appropriate.

The report of the Magistrate, which while 'accepted' by District Court was neither approved or adopted by it, expresses view that plaintiff appellant preferred 'discovery' to a money judgment and further offers opinion that when defendant refused to 'make discovery' (sic in context this should be read 'make disclosure' or 'comply with discovery demands') there was nothing further that District Court could do and that it would be futile to issue further orders, failing to take into account the availability of contempt determinations. At the very least, refusal of a party to comply with discovery orders is scarcely ground for denying subsequent motions for discovery.

The record before us is one that all but defies comprehension as result of plaintiff, in disregard of an order wherein ' court urge(d) plaintiff to obtain counsel', acted as his own attorney. For this reason, it is difficult to ascertain whether plaintiff-appellant understood the order from which the appeal was perfected, since his brief states: " * * * Magistrate said defendant should be granted a default judgment, PROVIDING that plaintiff submits a written notice of application for default judgment * * * " (underlining supplied). If plaintiff was in fact under misapprehension that an application would result in default judgment for defendant, his resistance to such default judgment, otherwise difficulty to comprehend, becomes understandable.

As indicated, Magistrate has expressed view that plaintiff appeared to prefer success in conducting discovery proceedings to obtaining a judgment. Another alternative would appear to

exist * * * namely, that he felt some other form of relief preferable to a money judgment. A clue to such alternative relief may be found in prayer of December 15, 1972 amended-complaint (doc 8) wherein plaintiff included prayer for specific performance. While we do not herein reach the issue of abuse of discretion in issuance of the conditional order in view of our determination of its lack of finality, the foregoing is offered for whatever assistance it may afford in consideration on the remand hereinafter ordered in what may with some justification be regarded as an overabundance of caution in our desire to protect the rights of this pro se plaintiff. We would perhaps be less solicitous had not both Magistrate and District Judge agreed that appellant was entitled to default judgment. Since they both thus say he is entitled to something we hesitate to turn him away with nothing, we echo urging of District Judge

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to plaintiff to retain counsel. Accordingly, it is Ordered that this appeal be and hereby is dismissed on ground that the order from which the appeal was sought to be perfected was not a final order.

It is further ordered that this cause be and it is hereby remanded to District Court for such further consideration as it may deem appropriate.

Entered by Order of this Court.

John P. Hehman
Clerk

(record p71-79)

17a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex G)
(doc 30)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
O R D E R

(Jan 7, '74)
(4:36 PM)

Based on findings and conclusions of Magistrate
it is Ordered that Report of Magistrate be accept-
ed and that several motions of plaintiff and * * *
'praecipe for replevin and attachment' be overruled

It is further ordered that this case be dismis-
sed with prejudice unless within 30 days plaintiff
submits an application for default judgment.

David S. Porter
Judge

(record p69)

18a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex H)
(doc 29)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
REPORT OF
MAGISTRATE
(Jan 7, '74)
(4:36 PM)

On May 7, 1973 this court filed Order in this case declining to act on plaintiff's motion to compel discovery because other requests for discovery by plaintiff remained unanswered by defendant and indicating to plaintiff that an application for default judgment was appropriate (doc 20). Plaintiff has not submitted an application for default judgment. He has made * * * filings since entry of May 7, 1973 order.

2. On May 18, 1973 plaintiff filed (doc 24) entitled "Magistrate's Reference Report (doc 20) - request for answers and objections thereto."

This filing contains a series of questions apparently directed to court or magistrate in-

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quiring about various statements contained in Report of Magistrate filed May 7, 1973 * * * .

4. On December 7, 1973 plaintiff file motions to: a. to set aside Magistrate's Reference Report
b. to set aside Order (doc 21) based on same
c. to impose sanctions per doc(18), Feb-1973
d. to permit joinder (Group B) defendants and claims (former counsel). * * * Gist of memorandum appears to be that it is improper to give default judgment as sanctions under Rule 37 where discovery answers have not been supplied by (defendant) to whom discovery has been directed. It seems that plaintiff would rather have discovery than judgment.

The parties that plaintiff wishes to join are his former counsel. The additional claims he wishes to add by amendment are for compensatory and exemplary damages.

5. On December 28, 1973 plaintiff filed * * * "praecipe for replevin and attachment" * * * re-

lating to plaintiff's personal property in possession of Arlan Discount Stores (undergoing bankruptcy) * * *. It is recommended that motions currently on file by plaintiff be overruled since the relief sought is inappropriate.

If a party refuses to make discovery, the Court can do nothing more than to grant requesting party judgment. The Court is not required to multiply futile orders requiring discovery. The motion to add plaintiff's former counsel as parties is without merit. Whatever relief plaintiff might be entitled to against them * * * can only be asserted in a separate proceeding * * * .

We suggest there is no obligation on the court to * * * receive filings from a party which are not calculated to advance disposition of the litigation, particularly where party refuses to accept the guidance of the court. * * * It is our recommendation that this case be dismissed with prejudice, unless within 30 days plaintiff submits

application for default judgment.

Burton J Perlman
Magistrate

(record p66-68a)

(July 19, 1976 plaintiff filed brief of second appeal. Magistrate Perlman replaced as District Court Magistrate, July 21, 1976. He was subsequently appointed a bankruptcy judge.)

22a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(EX J)
(doc 21)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
O R D E R

(May 7, '73)
(9:10 AM)

In connection with motion for discovery herein and motion for leave to file amended complaint (doc 19, joinder), this matter was referred to the magistrate under Order of Reference No. ____.

The Report of Magistrate is filed herein (doc 20). After consideration the court finds that motion for leave to file amended complaint (joinder of officers & directors) is not well taken and is denied. We have examined the complaint (doc 19) and find no significant difference between original complaint (doc 8) and amended complaint (doc 19) * * *. There is no showing the amendment is necessary in interest of substantial justice.

23a

As to motion to compel discovery, Court agrees with Magistrate that it would be futile to act on that because other requests for discovery stand unanswered * * *.

The Court, on its own motion, now grants request of Bernard Rosenberg to withdraw as counsel for the defendant, due to lack of cooperation from forwarding counsel (A David Gomborov) and in view of such consent of forwarding counsel attached to letter of April 3, 1973 from Bernard Rosenberg to the Court * * *.

David S Porter
Judge

(record p46-47).

24a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex K)
(doc 20)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
REPORT OF
MAGISTRATE

(May 7, '73)
(9:10 AM)

This action arises by reason of alleged breach of agreement entitled "Dutchie Equipment Investor Agreement" * * *. The suit was commenced in Hamilton County Common Pleas Court and defendant filed an Answer there. Defendant removed the case to this court and we suggest that this action is of significance somewhat greater than usual in this case. Subsequently plaintiff parted company with his counsel and is now appearing pro se.

On December 15, 1972 this court entered Order granting plaintiff leave to amend the original complaint and ordered that defendant respond to amended complaint (doc 8) within 20 days thereof.

25a

No Answer or other action has been taken by defendant. Before us are motions by plaintiff to compel discovery. Examination of papers filed in support of such motion show that plaintiff's efforts at discovery have been met by silence on part of defendant. Defendant, after having removed the action to this court, is not participating further in the litigation. Under these circumstances it is our recommendation to court that plaintiff be granted default judgment against defendant. All indications are that it would be a vain act for court to issue discovery enforcement order under Rule 37.

Defendant's failure to comply with order of this Court that it answer amended complaint (doc 8) is sufficient basis for award of default judgment under Rule 55(a) of Fed Rule Civ P.

Examination of amended complaint leaves us not entirely clear as to relief which plaintiff should take by default judgment. It seems to us that

26a

prayer for specific performance of the agreement
* * * would be inappropriate and relief accorded
to plaintiff should be by way of damages and ac-
counting. As to damages items contained in pars.
3,4, and 5 - - of prayer, the Court might wish
* * * that plaintiff reduce these to a sum cer-
tain before entering judgment PROVIDING that
plaintiff submit written notice of application
for judgment in accordance with the proceeding
remarks, serving same on defendant.

Burton J. Perlman
Magistrate

(record p44-45; magistrate's unannounced-
unattended reference).

27a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex L)
(doc 13)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
O R D E R

(Dec 15, '72)
(3:33 PM)

The Court hereby grants plaintiff's motion for
leave to amend their original complaint and orders
filed herein the amended complaint submitted with
the motion.

It is further ordered that defendant respond to
said amended complaint by Answer or motion within
20 days of date of this order.

David S. Porter
Judge

(record p14)

28a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Ex M)
(doc 6)

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

NO. 8155
PRETRIAL
Order No. 1
(Mar 13, '72)
(5:13 PM)

This is an action removed from Common Pleas Court of Hamilton County and is an action on contract * * *. No Answer has been filed by defendant. Counsel for defendant failed to appear at the initial pretrial conference. At pretrial conference, counsel for plaintiff was advised by the magistrate that discovery must proceed. Counsel indicated that he will seek information * * * within ten days of this order and * * * take deposition of officer of defendant. Both parties will furnish * * * report in writing by April 21, 1972.

SO ORDERED: Burton Perlman
Magistrate

(record p3a)

29a

(Ex N)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN
plaintiff-appellant

NO. 76 - 1750

- v -

DUTCHIE, INC.
defendant-appellee

PETITION FOR
REHEARING

(Apr 7, '77)
Judge, David S Porter

FILINGS ON APPEAL:

(brief & petition referenced
to record)

- I. appellant's brief (p1 - p54)
 - A. record (appendix)(p1 - p183)
 - B. exhibits (ex) (p1 - p75)

P E T I T I O N F O R R E H E A R I N G

A. Wherein, Rule 8 provides - within 15 days after an appeal is docketed, June 10, 1976, * * * appellee may file motion to affirm * * * the 15 days may be waived by the court * * *.

1. With neither appellee nor appellee's non-local counsel of record, A. David Gomborov, responding to (appeal) court's docketing letter of June 10, nor to appeal court's letters of September 24, 1976 and November 10, 1976, that : " The Court requires that an appellee's brief be filed in this matter. " Thus preserving appellee's wilful, continuing, ignoring of directions and orders of Federal Courts - - extending from December 15, 1972 ordered-response to amended complaint (doc 8) (record p4-12b), and December 1972 court-permitted, twin-withdrawals of Cincinnati counsels for both appellant and appellee.

a. On appellant's motion, District Court reinstated appellee's counsel re plaintiff's dis-

been unsuccessful.

Office of the Clerk
United States Court of Appeals
For The Sixth Circuit
Cincinnati, Ohio 45202

September 24, 1976

Dutchie, Inc.
Smithsburg, Maryland

re: Wilson O'Brien v Dutchie, Inc.
Our No. 76-1750

Dear Counsel:

* * * The Court requires that an appellee's brief be filed in this matter. * * *

- - - - -
November 16, 1976

Dutchie, Inc.
539 West Howard Street
Hagerstown, Maryland 21740

re:

* * * The Court requires that an appellee's brief be filed in this matter. * * *

- - - - -
June 10, 1976

Dear Mr. O'Brien:

We have today filed the certified record on appeal and docketed the above-captioned case as

No. 76-1750 in this Court. * * An additional copy of your brief should be served on the attorney for the appellee * * *.

CC: Mr. A. David Gomborov
112 East Lexington Street
Baltimore, Maryland 21202

III. STATEMENT OF ISSUES FOR REVIEW

A. Issues herein involve abuse of discretion and process, Wherein:

1. Issue No. 1 - in denying plaintiff's motion to compel discovery and court's failure to impose sanctions on plaintiff's failure to make discovery; while no-response, no-counsel, non-appearing George E. Snyder, Pres., Dutchie, Inc., continually ignores orders of the courts.

a. Notwithstanding show cause order (doc 37) May 2, 1975.

2. Issue No. 2 - on denying plaintiff's motion to file supplemental amendment and/or joinder parties-defendant in plaintiff's efforts

(Ex P)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILSON O'BRIEN
plaintiff

- v -

DUTCHIE, INC.
defendant

Civil Action
NO. 8155

AFFIDAVIT, Rule
No. 17 (b) (1)

STATE OF OHIO, COUNTY OF HAMILTON, SS:

Plaintiff, Wilson O'Brien being duly sworn on oath states the following; that to best of his knowledge, information, and belief, the efforts taken to resolve the issues of the action herein with Defendant consist of the following steps from October 6, 1971, period of date of removal of the action by defendant from Common Pleas Court, Hamilton County, Ohio to United States District Court for Southern District of Ohio, through present date of January 23, 1973:

1. Prior counsel for plaintiff had one meeting of record with counsel for defendant of 1.2 hours prior to May 22, 1972 without the Magistrate;

2. Prior counsel for plaintiff had one meeting of record with counsel for defendant of 2,4 hours on January 25, 1972 with the Magistrate;

3. Prior counsel for plaintiff provided counsel for defendant with one set of approximately eight interrogatories during period April - May, 1972;

4. No other known meetings of prior counsel for plaintiff with counsel for defendant during period May, 1972 through December 8 and December 11, 1972 their respective dates of withdrawal requests;

5. On October 10, 1972, following receipt of letter of resignation of prior counsel, dated October 4, 1972 plaintiff provided counsel for defendant with an amended pleading. No answer received to date. (ex p 51, on appeal, 76-1750)

6. November 28, 1972 plaintiff served defendant with: a. five interrogatories -

b. four requests for admissions

c. eight requests for production of document with covering letter requesting arrangement to

meet to work towards the resolving of issues. No replies received, other than withdrawal requests;

7. and Telephone call from defendant (George Snyder) to plaintiff, January 2, 1973. Gist of same as follows:

George Snyder wanted to know if plaintiff would be acceptable to defendant flying to Cincinnati for a personal, private, conversation on case 8155 as to possibility of resolving it. Presumably to his way of thinking - on modification of original pleading.

George Snyder stated that he did not know what the case was all about and would have to have several days to study it. That his Baltimore, Maryland counsel, Gomborov, had not been representing Dutchie, Inc. since about April, 1972. That Gomborov purportedly was - - - - - related to a member of, or was a member of, Dutchie, Inc. prior to April-1972.

He said that Vince Petti is now with Pet

Milk Co., St. Louis, and that he would have Mr. Petti meet with us in Cincinnati if I, plaintiff, wanted him to. George Snyder informed plaintiff that Dutchie, Inc. was a very different organization than what it started out to be and that all manufacturing and distributing operations have been franchised to others. That he, George Snyder has been busy putting a million-dollar-deal together and this is reason he has not been in touch with the lawsuit.

Mr. Snyder purportedly did not know that Eberle & Son, Cincinnati frozen-food-pretzel distributor were selling competitor's (Bachman's) pretzels to Dutchie-equipment-located-accounts. He also purportedly did not know that Ohio Steak and Barbecue, Columbus, Ohio distributor could not get any communication to or from Pet Milk Co. St. Louis - or deliveries - and therefore discontinued Dutchie pretzel operation because of this and the defective equipment, and equipment

withdrawal (by Dutchie) in Lodi (Cleveland), Toledo (Detroit) and Michigan . (ex p52, on appeal)

George Snyder did know that Dutchie operation had deteriorated to a standstill as far as ready-bake-oven portion of business was concerned in the Greater Cincinnati - Columbus and other areas of petitioner's Dutchie-DEI-contract.

He stated that Dutchie did not receive copy of letter from Judge's office, of December 15, until December 23, and did not receive copy of plaintiff motion until December 26. That he would study file and proceed to secure replacement counsel for Cincinnati. Mr. Snyder wanted to know if plaintiff had 'fired' prior counsel and plaintiff told him 'No'. He then wanted their name and address, plaintiff told him to look into his files.

Plaintiff informed Mr. Snyder that plaintiff would continue with legal procedures permitted by the Court, that if defendant had any concrete offers he should place them in writing and plaintiff

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would be open to meeting with him in presence of
the Court. * * *

During discussion, plaintiff told Mr. Snyder to
read the contract, amended pleading, and discovery
proceedings as these would form basis for his re-
quired performance.

Wilson O'Brien
Wilson O'Brien, affiant

Subscribed and Sworn to before me,
this 23 day of January, 1973.

Elva E Hittner my commission expires
Notary Public, State of Ohio Jan. 9, 1978

(ex p53, on appeal, 76-1750).

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(Ex Q)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILSON O'BRIEN
plaintiff

- v -

Civil Action

DUTCHIE, INC.
defendant

NO. 8155

Transcript of Proceedings

May 27, 1975

filed August 18, 1975 (doc 41)

by Roger V Yenke, court reporter

(app p113-122) *

Clerk: Your honor, this afternoon we have civil action 8155, Wilson O'Brien vs Dutchie, Inc. This is a show-cause hearing. Apparently, Dutchie is not represented.

Court: Well, did you get a copy of the order ?

O'Brien: Yes, sir.

Court: And the pertinent part * * * this Court ordered plaintiff to show cause why this action should not be dismissed, in view * * * that plaintiff is entitled to default judgment but plaintiff has not made application for one under Rule 55 * * *. We granted (May 2, 1975) your application for entry of order to impose sanctions on failure to make discovery which was filed February 13, 1973. Defendant was ordered to answer plaintiff's (discovery) interrogatories dated November 28, 1972 within 20 days of this order (May 2, 1975). I suppose that hasn't been done.

O'Brien: No, sir.

Court: Well, my secretary (p3) received a call and

recorded it, and I've listened to the recording.

* * * It's from a person by name of George Snyder who now lives in Florida, formerly lived in Maryland. This was received May 22 * * *. He advised that Dutchie was no longer an operating company, that it had forfeited its franchise, that it was in bankruptcy situation * * * I take it the only reason, according to him, that they hadn't taken bankruptcy * * * because there was only enough property to satisfy the first mortgage, if enough. There wasn't enough to satisfy the second mortgage. He said the company has no means to employ an attorney, and he asked for instructions of what to do. * * * I thought I would pass that information along to you for whatever it's worth.

O'Brien: Can he go bankruptcy on fraud ?

Court: Well, I'm not here to give advice. But if the company -- your claim is against the company?

O'Brien: It's against the company and (p4) anyone behind the company.

Court: Are there any named defendants in this case

O'Brien: I have tried to include my former counsel as defendants in the case. I have tried to include the board of directors of Dutchie, Inc. in the case in prior motions. In my supplemental amendment, filed May 16 * * * I again brought up * * * my former attorneys and again the directors of Dutchie, Inc.

Court: Is this document * * * what you filed?

O'Brien: Yes, sir.

Court: You're not satisfied then to file application for default judgment against Dutchie, Inc.?

O'Brien: If your statement says that they are not in operation, would there be a point in filing a default judgment against Dutchie, Inc., if you said they take bankruptcy, which -

Court: I don't know. All I'm doing is passing on the information * * *

O'Brien: (p5) The gentleman is a former state senator in Maryland.

Court: Yes. He is a former candidate for Governor. He gave his credentials. I don't know whether we can allow any amendments at this late date.

O'Brien: They (were) tried to be put in the case two years ago * * * A year and half to two years ago it was endeavored to make these amendments and expand the case to include my former counsel and directors of Dutchie, Inc. This is all fraud from the beginning, involving counsel on both sides and criminal action reaching Toledo and Ohio Supreme Court.

Court: Well, I'm sure they aren't going to appear for this motion, so if you want to argue in support of your motion, we'll listen to you now * * *

O'Brien: (p6) The supplemental amendment runs only four or five pages with an affidavit in support of the amendment and objecting to order (doc 37).

Court: Objecting to (doc 37) ?

O'Brien: Running about seven pages. Maybe, if I for the record read the affidavit rather than the

amendment, both will come through. We'll get it on the record. 'Objection, by affidavit, of plaintiff re Order (doc 37) and affirmations in support of supplemental-amendment * * * (p7) plaintiff, Wilson O'Brien, being duly sworn on oath, this 12th day May, 1975, states averments made, and affidavits and exhibits herein are to affiant's personal knowledge and belief, with affiant being competent to testify to matters detailed within. Pleadings of supplemental amendment (doc 38) herein, incorporated here, by reference, detailing relation back to par 6m of pleading (doc 8) as regards: transactions or events which have happened since December 15, 1972, date of pleading sought to be supplemented and which arose out of conduct, transaction, or occurrence set forth or attempted to be set forth in (doc 8).'

Court: (p8): I don't think you need to read that. We'll have to read it and see what you've got,

see what amendments you were going to make. We were of the opinion that the only relief you could get was a judgment against Dutchie, Inc. I don't know whether your pleadings can be amended at this late date to include anybody else * * * So we'll have to look at your motion, see what you say and pass on that in due course.(December 29, 1975 - doc 43, Appendix D).

O'Brien: Under conspiracy, any and all that participate in that conspiracy is liable.

Court: Have you named individuals or just groups?

O'Brien: * * * In the amendment the board of directors were individually named. Their names and addresses were given in State of Maryland. My former counsel were individually named as well as firm of Brumleve, DeCamp and Wood * * *

Court: Well, we'll take a look at it. We'll do what we have to do.

O'Brien:(p9): And I don't think an ex-state senator, would-be governor, crooked businessman,

46a - T:8

swindler should be able to evade legal responsibilities by saying I'm living in Florida and my company is bankrupt. * * *

R E P O R T E R ' S
c e r t i f i c a t e

Roger V Yenke

47a - Aff:1

(Ex R)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILSON O'BRIEN
plaintiff

Civil Action - File 8155

- v -

DUTCHIE, INC.
defendant

AFFIDAVIT - re: Hearing
and subsequent thereto
May 27, 1975 re doc 37

STATE OF OHIO, COUNTY OF HAMILTON, SS: In the matter herein of hearing, May 27, 1975 and events immediately subsequent thereto, at 3PM re: Order (doc 37) for plaintiff to show cause why plaintiff's action should not be dismissed and for purported imposition of penalties and sanctions of Rule 37 on non-appearing, non-complying defendant;

Wherein plaintiff, Wilson O'Brien, being duly sworn on oath this 27 day, January, 1976, states the averments made herein are to affiant's personal knowledge, with affiant being competent to testify as to matters so stated and proceedings as involved therein -

Whereas,

Court starts hearing, with only plaintiff present, by reading, apparently with difficulty, a -

a. purported transcript of a tape or wire message received through purported phone call from George Snyder, President, Dutchie, Inc., weekend, Friday, May 23, 1975, and

b. apparently court does not fully understand the purported message and the court is not fully clear as to its contents, context, or meaning -

c. but court reads message, to wit:

(1) George Snyder purportedly living in Florida and Florida purportedly is source of message -

(2) George Snyder purportedly no longer with Dutchie, Inc. and/or Dutchie, Inc. no longer has franchise (court does not indicate what type of franchise has been forfeited or lost)

(3) Dutchie, Inc. purportedly either in bankruptcy or on verge of being bankrupt -

(4) Dutchie, Inc. assets purportedly approximate-

ly \$ 5000,000.00 already covered by first mortgage -

(5) Dutchie, Inc. (George Snyder) purportedly has no funds to employ counsel or to appear at hearing

(6) purported aim of message is to enable George Snyder to avoid purported invoking and imposition of Rule 37 penalties and sanctions as expressed in court's order (doc 37) of May 2, 1975 -

Court then indicates that doc 37 orders plaintiff to show cause why plaintiff's action should not be dismissed for plaintiff's failure to file for default application under Rule 55 -

a. plaintiff inquires if court means for plaintiff to file for default judgment with bankrupt defendant -

(1) a purported bankrupt filing when such action includes fraud and deceit, a contrary to law procedure (but apparently not unbelievable)

b. plaintiff indicates to court that on May 16, 1975 plaintiff file supplemental Amendment along

with Affidavit - Objection (apparently to court's surprise) and attachments as regards court's order (doc 37) of May 2, 1975.

Plaintiff indicates that since Affidavit-Objection also affirms contents of Supplemental Amendment, plaintiff will read it into the record -

a. to show objections to doc 37 and affirmation of supplemental amendment,

b. court is unable to follow visually (physically) find and follow reading of plaintiff,

(1) plaintiff approaches the Bench to locate page and paragraph of affidavit

(a) court indicates that it will not be necessary for plaintiff to read the affidavit, court will read it later in chambers;

Plaintiff indicates that May 16 Supplemental Amendment and Affidavit-Objection both include and restate plaintiff's efforts to join as co-defendants, former counsel of plaintiff and the

officers and directors of Dutchie, Inc.

a. that it was failure of court and not of plaintiff that such persons had not as yet been joined as co-defendants.

(1) that May 16 Supplemental Amendment filing included plaintiff's former counsel in relation to Memorandum of Jurisdiction pending in Supreme Court of Ohio in relation to par 6m (p8 of doc 8) of plaintiff's amended complaint, December 15, 1972

(a) that filing in Ohio Supreme Court covered fraudulent action by other members of defendant's fraudulent conspiracy -

Plaintiff made request of court reporter May 27 1975 for transcript of May 27 hearing, with reporter to mail and bill for same -

a. August 15, 1975 plaintiff made second oral request for said transcript -

b. August 15, 1975 plaintiff hand-delivered written-request for same -

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c. plaintiff subsequently received same later in August; same being opened by court reporter and and court reporter fee being paid by plaintiff 1-6-76;

Immediately following May 27 hearing, plaintiff attempted to locate and obtain copy of source paper, or document, or record, of court's communication from George Snyder re: page 1 and page 2 herein -

a. plaintiff, twice, in presence of newly starting Cincinnati Post Reporter, William Tom Aubrey, requested copy of, and source from, and details regarding communication read by court, from court secretary, Miss Betty Kinsey -

b. plaintiff made same request one in presence of court reporter and once in presence of - - clerk, Mr. Dan Lyons, both in presence of Cincinnati Post reporter -

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c. in both instances Miss Kinsey replied:

(1) there was no wire or telegram, no document, nor any record of any call, that could be copied -

(2) there was no record of any phone call received, nor of any calling source number -

(3) that she did not recall receiving any phone call but that it must have been from someone representing himself as George Snyder from somewhere in Florida -

(4) that she could not recall an incoming call, nor making any notes concerning the call, nor the calling number or person, or any of the details -

(a) that in whatever manner the court had indicated the message had been received (in hearing) and its contents and source would have to stand -

d. Mr. Dan Lyons obtained file 8155 from judge's chambers, (1) check of file did not reveal any source message, nor any message that could be copied,

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d.
(a) Mr. Lyons returned file 8155 to judge's
chambers.

Wilson O'Brien
Wilson O'Brien, affiant

Subscribed and Sworn to before me,
this 27 day, January, 1976 -

Elva E Hittner my commission ex-
Notary Public, State of Ohio

pires, Jan 9, 1978

55a

(Ex S)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN
appellant

- v -

DUTCHIE, INC.
appellee

NO. 76-1750
O U T L I N E
on appeal 8155

(June - 1976)

A P P E N D I X

A. - Document/Entry of Record (Ex P:1)

B. - Exhibits of Record (Ex P:2)

A. Document/Entry of Record:

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
(doc 1) 10-6-71	petition for removal to US District Court - - "w/Answer"(added)	1-3
(doc 6) 3-13-72	magistrate's pretrial or- der no. 1 entered by J Perlman. De- fendant failed to appear. Both sides to submit written status report by 4-21-72. No Answer has been filed by defendant. Discovery must proceed. (see 3b tp 3e)	3a
(doc 8) 12-15-72	amended complaint, filed 10- 12-72, ordered filed	4-12b
(doc 13) 12-15-72	defendant ordered to re- spond within 20 days of 12-15-72	14

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
(doc 16)	1-23-73 motion to compel discovery, affidavit per local rule 17(b)(1), and supplemental discovery	15-20
	with: discovery interrogatories (11-28-72)	22-24
	requests for production (11-28-72)	25-31
	requests for admission (11-28-72)	32-38
(doc 18)	2-13-73 application for entry of order to impose sanctions & order therein per local rule 17(f)	40-41
(doc 19)	3- 6-73 motion to amend pleadings par 8 of (doc 8) to add joinder of officers & directors, Dutchie, Inc.	42-43
(doc 20)	5- 7-73 magistrate's report re Reference No. ___ entered by J. Perlman recommending petitioner be granted default judgment providing petitioner submit written notice * * * according to proceeding remarks (of unannounced reference)	44-45
(doc 21)	5- 7-73 Order by J Porter that motion for leave to join officers & directors * * * is denied. As to motion to compel discovery, court agrees with magistrate that it would be futile to act on that because other requests for discovery stand unanswered. * * * Court, on its own motion, grants request of Bernard Rosenberg to withdraw (2nd time), due to lack of cooperation of forwarding counsel GOMBOROV.	46-47

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
(doc 23)	5-11-73 affidavit * * * as regards dates, certifications, journal and docket entries, filings and correspondence(transmit with record)	- -
(doc 24)	5-18-73 request for answers & objections to magistrate's reference	48-50
(doc 26)	12- 7-73 motion to set aside (doc 20) & (doc 21), to impose sanctions (doc 18)	51-56
	12- 7-73 supplemental pleading motion to add joinder (Group B), the former counsel of petitioner	57-62a
(doc 27)	12-28-73 affidavit-replevin-damages re Arlan Discount Stores	63-65
(doc 29)	1- 7-74 Magistrate's Report by J Perlman recommending that motions by petitioner currently on file be overruled since relief sought is inappropriate and any relief against former counsel can only be asserted in a separate proceeding. That this case be dismissed with prejudice unless within 30 days petitioner submits application for default judgment. Issued O'Brien & Dutchie, Inc	66-68a
(doc 30)	1- 7-74 Order by J Porter based on finding and conclusions of magistrate. It is ordered that report of magistrate be accepted and that motions of petitioner be overruled * * * This case is dismissed with prejudice * *	69

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
(doc 33)	1-24-74 petitioner' appeal notice	70
(doc 36)	10-14-74 Order, Sixth Circuit Court of Appeals remanding case to District Court because Order (doc 30) is a conditional order * * *	71-73
(doc 37)	5- 2-75 Order by J Porter * * * it is ordered that on May 27, 1975 - - petitioner show cause why this action should not be dismissed, in view * * * that this court has held that plaintiff is entitled to default judgment but plaintiff has made no application under Rule 55 * * * Petitioner's application for entry of order to impose sanctions on failure to make discovery (doc 18) filed February 13, 1973 is granted. Defendant is ordered to answer plaintiff's interrogatories dated November 28, 1972 * * * to produce documents * * * requests of November 28 * * * and to respond to plaintiff's requests for admissions of November 28, 1972 * * * and to respond to supplemental (discovery) requests of January 23, 1973 - within 20 days of this order dated May 2, 1975 * * * or show cause at May 27 hearing why it should not be held in contempt for such failure. 74-75	
(doc 38)	5-16-75 petitioner's supplemental amendment plus affidavit and exhibits re order (doc 37), and to include (doc 38) as addendum to amended complaint (doc 8), copy attached therewith	76-78

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
(doc 38 with):	Bill Exceptions (item 16)-affidavit re Lucas County, Case 74-0982 - - - Arrest warrant w notations, case 40053, Franklin County Munc Court - - Affidavit(ex B) - case 40053 - - Notice of Appeal to Ohio Supreme Court re 7821 (74-0982) from Sixth District Court of Appeals (Lucas)- Memo, May 6, 1972 & May 10, 1972 from petitioner to former counsel- Letter, July 11, 1972 from prior counsel to petitioner - Invoice August - 1972 from prior counsel to petitioner - Letter Sept. 14, 1972 (2d page) from petitioner to prior counsel re case status, Answer, fraud, etc. -	89-95 - - - - - -96 - - 97-100 -101-102 -103-104 - - - 105-106 - - - - - 107 - - - - - 108
(doc 38 also with):	(doc 26) joinder, former counsel; (doc 19) joinder, officers & directors; (doc 27) replevin/damages; and (doc 36) remand of Sixth Circuit CofA.	
	Case called for show-cause hearing May 27, 1975 * * * No one appeared for defendant.	
(doc 40)	5-30-75 petitioner filed anew a combination joinder motion of (doc 26) and (doc 19), parties-defendant.	
(doc 41)	8-18-75 Court Reporter files Transcript of May 27, 1975 proceedings of 9-pages	109-112
(doc 42)	8-15-75 petitioner's followup re (in B request for copy of May 27 transcript ex)	

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
(doc 43)	12-29-75 Order by J Porter re Order (doc 37) of May 2 that within action be dismissed, without prejudice, unless within 30 days * * * plaintiff applies for default judgment(conditional order), or in alternative, asks for and obtains leave to file amended complaint which seeks to add parties-defendant and states facts upon which relief can be granted. Issued O'Brien & GOMBOROV.	123-124a
(doc 44)	1- 7-76 petitioner's motion for time extension	125-126
(doc 46)	2- 6-76 petitioner's objection to and motion to vacate order (doc 43) * * * to incorporate matter herein as addendum to (doc 38)	127-164
	(doc 46) has 2 page cover of 11.0 sec. outline; exhibits of doc 46 included as sec. B of appendix on appeal; (also included in doc 46 were: doc 43, 37, 44, 21, 41, 40, and 26 * * *).	
(doc 47)	3-12-76 petitioner's followup motion to vacate order (doc 43)	165-166
(doc 48)	3-22-76 Order by J Porter * * * we see nothing in his submission which seeks to name anyone but defendant (Dutchie) * * * and must conclude that petitioner has not shown cause why this case should not be dismissed for lack of prosecution (for failure to apply for default judgment)* * * plaintiff has not	

(DOC NO) & DATE:	TITLE & NATURE OF DOCUMENT/ENTRY	APPX PAGE
	complied with order (doc 43) * * * the within action is dismissed, without prejudice, at petitioner's costs	167-168a
(doc 49)	4- 1-76 petitioner's motion to stay proceedings pending appeal and revision of docket entries * * *	169-174
(doc 50)	4-20-76 petitioner's appeal notice	175

B. Exhibits brochure-outline, on appeal, supplementing appellant's brief and appendix following herein, includes previous filed exhibits and affidavits, as well as new affidavits and exhibits used in (doc 46).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN
appellant

NO. 76-1750

- v -

DUTCHIE, INC.
appellee

O U T L I N E
NO. 8155 on
appeal
(June 1976)

A P P E N D I X

B. EXHIBITS OF RECORD:

(doc 46 ex no.)	<u>description of exhibit</u>	<u>page no.</u>
4a-b	Dutchie auditors (1971) Lybrand, Ross Bros., & Montgomery	1 - 2
5	petitioner's letter 9-14-72 to former counsel re status, Answer, fraud, etc.	3
6	arrest warrant with Franklin County Municipal Court notations thereon	4
7b	Dairy Field (1969 reprint) Snyder Soft Pretzel Corp., Dutchie, Inc.	5
9	LUCAS COUNTY COMMON PLEAS COURT & SIXTH DISTRICT COURT OF APPEALS:	
9a	motion 11-10-75 re hearing to strike and vacate void, falsely-obtained, default judgment of 11-13-74	6
9b	11-10-75 Affidavit of Disqualification	

(doc 46 ex no.)	<u>description of exhibits</u>	<u>page no</u>
	re common pleas Judge, John J Connors, Jr. re (9a, p72a)	7-20
9c	11-10-75 Affidavit of Disqualification re Sixth District CofA re (9b)	21-23
9f	Objection to and motion to vacate CofA entry of 1-2-76	24-28
9g	Sixth District CofA entry 1-16-76 striking 9(f) as 'stray paper' without Rules of Procedure	29
10a	John Davenport (Dutchie) letter 10-14-70 re current operations	30
10b	petitioner's 4-23-71 memo to George Snyder re Snyder's call of 4-20-71	31
10c	Dutchie (Greencastle, Pa) oven- manufacturing plant	32
10d	Tuck Lee (TL Inc, Toledo) letter 9-10-71 to petitioner re Dutchie- TL-Les Kefauver etc business re- lationships.	33
10e	Les Kefauver (Dutchie & TL) letters 3-23 and 3-29-73 to petitioner	34-35
10f	petitioner's 9-page memo to George Snyder re Dutchie & T L Inc.	36-44
10g	George Snyder's 6-7-71 letter to counsel Zins re V.P., Vince Petti	45

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(doc 46 ex no.)	description of exhibit	page no
10h	petitioner's 7-10-71 letter to George Snyder re Petti's visit June 16, 1971	46-50
11a	petitioner's affidavit per local rule 17(b)(1) filed with motion to compel discovery (doc 16)	51-53
11b	(doc 43) docket entry - issuing thereof to A David Gomborov	54
11c	Court's letter 3-17-73 to local counsel Rosenberg, twice withdrawn, re forwarding counsel A. David Gomborov, uncooperative	55
11c-1	David Gomborov letter 3-16-73 to George Snyder re Rosenberg ordered filed by Court, May 7, 1973	56
11d	Vince Petti, V.P. Dutchie, letter 9-7-71 re Dutchie finance director Barry L Gomborov, CPA; same office as A. David Gomborov	57
11e	Pet, Inc. (franchisee) brand name 'Downyflake' pretzel of Dutchie (franchisor); Vince Petti employed by Dutchie and Pet, Inc.	58
11f	Hadley Farms Dairy, Gaithersburg, Md., 20760 distributor Dutchie logo pretzels (1975-76; see ex 12e)	59
11g	petitioner's 4-28-72 memo to Coyle, Dayton, Ohio (Ohio Steak & Barb) re: Sam T Hankey, V.P., Dutchie, Inc.	

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(doc 46 ex no.)	description of exhibits	page no
	telephone conversations, etc.	60
12a	court's letter 12-15-72 to petitioner re amended complaint (doc 8) - "extended recitation of facts gives cause for concern"	61
12b	return receipt signature (doc 38), May 15, 1975 -	62
12c	return receipt signature (doc 40), June 5, 1975	62
12d	return receipt signature (doc 44), January 10, 1976	62
12e	listing - Hadley Dairy, Dutchie Div., 47 S Main St., Smithsburg, Md. 1975	62
13a - - -	petitioner's Affidavit re Hearing, May 27, 1975 as to pertinent events during and immediately subsequent thereto	63-66
13b	petitioner's twice oral and 8-15-75 hand-delivered request for May 27 - transcript	67
15	p9 of (doc 8) prayer for relief	68

(doc 46
ex no.) description of exhibit page no.

- - - - - MARYLAND NEWSPAPER ARTICLES:

16a Snyder, July 19, 1974 withdrawing
from Governor's race 69

16d June 8, 1974: Dutchie, Inc. - Pet,
Inc., and H. J. Heinz Co.(Ore-Ida) 70

16e June 4, 1974: firm in Smithsburg,
Md. founded by Snyder in 1964 70

16f Nov. 12, 1974: Snyder is major stock-
holder at 27%(initially at 44%) 71

16g Oct. 4, 1974: adverse publicity will
cost Dutchie thousands in legal fees,
lawyers will nitpick 71

16h August 8, 1975: Snyder got together
six stockholders and bought the mort-
gage * * * four more stockholders are
also in on the deal * * * 72

17 State of Delaware, Dept of Corpora-
tions, letter 1-28-76 re Dutchie,
Inc., listing officers & directors;
failure to pay State franchise tax
in March, 1974 73

18 Dutchie, Inc. Securities Prospectus
1969 lists officers & directors, shows
incorporation in 1966; Delaware Annual
Report (Stockholder) for 1969 shows date
of incorporation as December 16, 1969 75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Sep 2 '71

IN RE

ORDER NO. 2

UNITED STATES MAGISTRATES

DUTIES OF MAGISTRATES
AS TO MOTIONS AND
PRETRIALS IN CIVIL CASES

* * * Pursuant to 28 USC Sec 631 et seq that

* * * Judges may, in their discretion request the
Magistrate to perform such other duties * * *

Pursuant to this authorization Judges at Cin-
cinnati hereby order with reference to motions,
motions to dismiss, motions for summary judgment,
discovery motions and pretrials:

1. Unless otherwise ordered, all pretrial mo-
tions in civil cases, except motions * * * are
referred to United States Magistrate as Special
Master under Rule 53 Federal Rules Civil Procedure.

Though local rules are to be followed in sub-
mission of such motions, Magistrate may dispose of
by Order and Report at Magistrate's discretion.

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The Report will be subject to review on proceedings applicable to a report of Special Master, and

* * *.

2. All motions, objections, etc., arising in discovery proceedings under Rules 26-37 F. R. Civ P., and which become submitted under local rules * * * are submitted to Magistrate for decision. Whether any such matters are to be orally argued is to be at discretion of Magistrate. Oral argument will be exception and not the rule, and must be requested in writing.

Magistrate's determination by written Order, will be final in sense that it will not be subject to any review, de novo or otherwise by a District Judge, until all discovery proceedings are completed and case is at full issue and ready for final pretrial. * * *.

3. All civil actions are referred to Magistrate for accelerated docket and initial pretrial purposes.

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(Ex. V)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

Jul 25'73

UNITED STATES MAGISTRATE

Order No. 3

DUTIES OF MAGISTRATE
AS TO MOTIONS AND
PRETRIALS IN CIVIL CASES

* * * with reference to pretrial and discovery proceedings in civil actions pursuant to 28 USC sec 636 (b) (2):

1. * * * Magistrate shall issue report to District Judge to whom case is assigned with recommended disposition of the motion, after hearing or submission on memoranda and affidavits at the Magistrate's discretion. Disposition of any motion thereunder shall only be by Order of District Judge who may accept or reject report of Magistrate.

2. All motions, objections, etc. arising in discovery proceedings under Rules 26-37 F R Civ P * * * Magistrate's decision hereunder will on

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motion of aggrieved party be subject to review by District Judge, but such motion shall not be made until all discovery proceedings are otherwise complete. * * *

3. All civil actions are referred to Magistrate for accelerated docket and initial pretrial purposes. * * *

/s/ Timothy S Hogan, Judge

/s/ David S Porter, Judge

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B. Federal Rules of Civil Procedure Involved:

(appended to brief 'on appeal' 76-1750)

1. Federal Rule - 1966 Amendment, Writ p45, is statement of present Fed R Civ P No.21 (p75a).

2. No. 8(a) - General Rules of Pleading - a pleading which sets forth a claim for relief* * * shall contain (1) short and plain statement * * * of court's jurisdiction * * * unless court already has jurisdiction * * *; (2) short and plain statement of the claim showing that pleader is entitled to relief; (3) a demand for judgment for the relief to which he deems himself entitled.

Relief in the alternative or of several different types may be demanded.

3. No. 10(A) - Caption - (1972): wherein Gibbs v Lemley, 33 0 App2d 220; 60 00(2d) 315; 293 NE (2d) 324; stated: 'the names appearing in caption of case do not determine who are parties to the suit; whether or not defendant is properly in the case hinges upon allegations in body of complaint!'

4. No. 12(C) - 'tendency under FRCP is * * * to encourage use of discovery proceedings to apprise parties of basis of claims made in pleadings (Stromiller v Merrill, Lynch, Pierce, Fenner, & Smith, 54 FRD 396, Ohio Civ R 12 - 1976 supp, p31).

5. No. 15 - Amended and Supplemental Pleadings:

(a) Amendments - * * * otherwise a party may amend his pleading only by leave of court * * * ; and leave shall be freely given when justice so requires. A party shall plead in response to amended pleading within time remaining for response to original pleading or within ten days after service of amended pleading * * * unless court otherwise orders.

(b) Amendments to Conform to Evidence - such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; * * *

(c) Relation Back of Amendments - whenever

the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in original pleading, the amendment relates back to date of original pleading. An amendment changing the party against whom a claim is asserted relates back if (above) is satisfied and, within period of law * * *, (if such party) - (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known * * * the action would have been brought against him.

(d) Supplemental Pleadings - upon motion of a party the court may * * * permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since date of pleading sought to be supplemented * * *.

6. No. 18(a) - Joinder of Claims or Remedies -

a party may join either as independent or as alternate claims, as many claims, legal, equitable, * * * as he has against the opposing party.

7. No. 19 - Joinder of Persons Needed for Just Adjudication - (a) Persons to be Joined if Feasible: a person who is subject to service of process and whose joinder will not deprive court of jurisdiction over the subject matter or the action shall be joined in the action, if: (1) in his absence complete relief cannot be accorded among the already parties, or (2) he claims an interest relating to subject matter of action * * *.

8. No. 20 - Permissive Joinder of Parties - all parties * * * may be joined in one action as defendants, if there is asserted against them jointly, severally, or in alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will a-

rise in the action * * *. Judgment may be given * * * against one or more defendants according to their respective liabilities.

9. No. 21 - Misjoinder and Non-Joinder of Parties: Misjoinder of parties is not grounds for dismissal of an action. Parties may be added or dropped by order of court, on motion of any party or on its own initiative, at any stage of the action * * *.

10. No. 37 - Failure to Make Discovery; Sanctions :

(d) if a party or officer or director * * * fails to (2) serve answers or objections to interrogatories submitted under R 33 after proper service of the interrogatories * * * court may make such orders as are just and among others it may take any action under pars. (A), (B), & (C) of sec (b) (2) of this rule. Failure to act (respond) may not be excused unless party failing to act has applied for protective order.

(b)(2) If a party or officer or director * * * fails to obey an order to provide or permit discovery * * * court * * * may make such orders in regard to the failure as are just, and among others the following:

(A) an order that matters regarding which the Order was made or any other designated facts shall be taken as established for purposes of the action in accordance with claim of party obtaining the Order; and (B) an order refusing to allow disobedient party to support or oppose designated claims * * * or prohibiting him from introducing designated matters in evidence.

11. No. 43(e) - Evidence on Motions - when a motion is based on facts not appearing of record the court may hear the matter on Affidavits presented by the respective parties, but court may direct that the matter be heard * * * on oral testimony or deposition.

12. No. 46 - Exception Unnecessary - * * * if a

party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

13. No. 52 - Findings by the Court -

(a) Effect - In all actions tried upon the facts without a jury * * * court shall find the facts specifically and state separately its conclusions of law thereon * * *. Requests for findings are not necessary for purposes of review.

The findings of a Master (Magistrate) to extent that court adopts them, shall be considered as findings of the court. * * * Findings of fact and conclusions of law are unnecessary on decisions of motions * * * except as provided in Rule 41(b) - involuntary dismissal.

14. Rule 41(b) - Involuntary Dismissal - if the court renders judgment on the merits against the plaintiff, the Court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal (doc 30) otherwise specifies, a dis-

missal order under this subdivision, and any dismissal not provided in this rule, * * * operates as an adjudication upon the merits.

15. No. 53 - Masters -

(b) a reference to a master shall be exception and not the rule * * * in action to be tried without a jury, save in matters of account and difficult computations of damages - a reference shall be made only upon a showing that some exceptional condition requires it.

(d) when a reference is made * * * master shall forthwith set time and place for first meeting of parties or their attorneys * * * and shall notify the parties or their attorneys.

(e) master shall prepare report on matters submitted to him * * * and if required to make findings of fact and conclusions of law, he shall set them forth in the report.

(2) in action to be tried without jury the court shall accept the master's findings of

fact unless clearly erroneous. Within ten days after * * * filing of Report any party may serve written objections thereto * * *. Application to court for action upon the Report shall be by motion and upon notice per Rule 6(d).

(4) the effect of a master's report is the same whether or not the parties have consented to the reference * * *.

(c) * * * when a party so requests, the master shall make a record of evidence offered and evidence excluded in same manner and subject to same limitations as provided in Rule 43(c) for court sitting without a jury. (Rule 43c abrogated and replaced by Rule of Evidence No. 103):

RULE No. 103 - nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to attention of the court. * * * 'substantial right' is a term of art which is applied on case-by-case basis. Mechanical and technical rules are rejected in

finding a violation of a substantial right.

(Kottearos v U S, 328 US 750 (1946) (conspiracy)).

16. No. 54(c) - Default Judgment - a judgment by default shall not be different in kind or exceed in amount that prayed for in demand for judgment. * * *

17. No. 55 - Default - (d) * * * in all cases a judgment by default is subject to limitations of Rule 54(c).

18. Local Rule 17(f) - Entries in Absence of Objections to Discovery Motion, Etc.: Motions, applications and requests, to which objections are not seasonably filed, may be granted as a matter of course(as will orders directing answers to interrogatories) upon informal presentation of an appropriate proposed and endorsed order by counsel for the party initiating discovery.

19. Local Rule 17(b)(1): Motion to Compel Discovery: To the extent that extrajudicial means have not disposed of the matter, the party seek-

ing discovery may then proceed with filing of motion to compel discovery under R37, FRCivP. Said motion shall be accompanied by supporting memorandum which will state movant's legal basis which would entitle him to an order compelling discovery. The motion and memorandum shall also be accompanied by: (1) an affidavit of counsel setting forth what extrajudicial means have been attempted to resolve the differences; and (2) a copy of the interrogatories, application requests etc., which have previously been served pursuant to appropriate Rules of Civil Procedure. * * *

APPENDIX - C: Constitutional - Statutory:

Under Color of Office: Every person, who, under color of any statute * * * subjects or causes to be subjected, any citizen of U S * * * to deprivation of any rights, privileges, * * * shall be liable to the party in an action at law. * * * Under color of office * * * includes under civil rights - judicial action.(42 USCA sec 1983).

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(Ex W)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSON O'BRIEN
plaintiff-appellant

(May 19, '77)

- v -

NO. 76-1750

DUTCHIE, INC.
defendant-appellee

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY,
Circuit Judges:

ORDER STAYING MANDATE

ORDERED, that motion to stay mandate herein * * *
is hereby granted and mandate is stayed for thirty
days * * * provided that within such thirty days,
petitioner shall file with Clerk of this Court,
certificate of Clerk of Supreme Court that certio-
rari petition, record, and brief have been filed,
* * * Unless this condition is complied with in
such thirty days * * * the mandate shall issue.

ENTERED BY ORDER OF COURT.

John P. Heheman
Clerk

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(Ex X)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE
UNITED STATES MAGISTRATES:

June 22, '77
ORDER NO. 1

WESTERN DIVISION RULE NO. 1 -

This Order * * * pursuant to 28 USC sec 636
(b)(4): (each District Court shall establish rules
pursuant to which Magistrates shall discharge
their duties * * * Judges of Western Division
hereby adopt following Rule * * * as Western Div-
ision Rule No. 1 - United States Magistrates:
1.1 Powers and Duties * * * prescribed by 28 USC
sec 636(a)(1) and (2), and may do: (1) through (6)
1.2 Additional Duties - including but not limited
to following: (1) through (22), by reference, as
partially shown by pages 68-69 herein.
1.3 Nondispositive Pretrial Matters:
(1) In accordance with 28 USC sec 636(b)(1)(A),
Magistrate may hear and determine any pretrial
motion * * * other than motions specified in Rule
3 infra (as (A)) * * *.

* * * are referred to Magistrate for decision and order unless otherwise ordered by Judge of this Court(and, by reference, p69 herein).

1.4 Dispositive Pretrial Motions & Prisoner Cases:

(1) In accordance with 28 USC 636(b)(1)(B) and (C): Magistrate may hear and conduct (B) - any motion excepted in subpar (A) * * *.

(C) - Magistrate shall file Findings * * * under subpar (B) with Court * * * (and, by reference p69-70 herein).

1.5 Special Master Reference & Trial by Consent:

(1) Magistrate may serve as special master subject to procedure & limitations of 28 USC sec 636(b)(2) and Rule 53(Masters), Fed R Civ P.

1.6 Assignment of Duties to Magistrates:

* * * by general order or rules of court.

SO ORDERED: /s/ David S Porter, Judge
 /s/ Carl B Rubin , Judge
 /s/ Timothy S Hogan, Judge